

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

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 STEVES AND SONS, INC., : Civil Action No.  
 : 3:16cv545  
 vs. :  
 : February 13, 2018  
 JELD-WEN, INC. :  
 :  
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COMPLETE TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ROBERT E. PAYNE

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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VOLUME XI

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09:39:16 1 (The jury entered the courtroom.)

09:40:17 2 THE CLERK: Day ten. Case No. 3:16cv545, *Steves*  
09:42:57 3 *and Sons, Inc. v. Jeld-Wen, Inc.*

09:42:30 4 The plaintiff is represented by Lewis F. Powell, III,  
09:42:30 5 Ms. Maya Eckstein, Mr. Glenn Pomerantz, and Mr. Ted Dane.

09:42:30 6 The defendant is represented by Mr. Alfred Pfeiffer,  
09:42:30 7 Jr., Mr. Lawrence Buterman, Mr. Ryan Andrews, and  
09:42:30 8 Mr. Jason Daniels.

09:42:30 9 Are counsel ready to proceed?

09:42:56 10 MR. POWELL: Good morning, Your Honor. *Steves*  
09:42:57 11 *is ready.*

09:42:58 12 MR. PFEIFFER: Good morning, Your Honor. Ready  
09:42:59 13 for *Jeld-Wen.*

09:43:00 14 THE COURT: May I see Mr. Pomerantz -- who put  
09:43:03 15 on Shapiro? Would you come up, please.

09:43:10 16 (Discussion at sidebar as follows:)

09:43:18 17 THE COURT: Mr. Martecchini said something about  
09:43:21 18 Mr. Shapiro will not be ready to talk until 1:00?

09:43:26 19 MR. POMERANTZ: Yes. That's right, Your Honor.

09:43:27 20 THE COURT: Why is that?

09:43:29 21 MR. POMERANTZ: He flew in last night, and I  
09:43:30 22 haven't had a chance to work with him yet. He'll be done  
09:43:33 23 very quickly, Your Honor. It's only going to be less than  
09:43:36 24 an hour of testimony, we think.

09:43:37 25 THE COURT: But you're wasting time in between

09:43:39 1 if they're through at 11:30 and he's not ready until 1:00.

09:43:43 2 MR. POMERANTZ: Well, we didn't know in  
09:43:43 3 scheduling -- I had this earlier --

09:43:44 4 THE COURT: You -- you run his schedule. That's  
09:43:47 5 your job. You run his schedule, and he's to be here when  
09:43:50 6 you tell him to be here. That's what I told him when he  
09:43:53 7 left here, that you all were to tell him when to be back  
09:43:56 8 and he is to be back then.

09:43:58 9 MR. POMERANTZ: Well, Your Honor --

09:43:59 10 THE COURT: So maybe you ought to go start  
09:44:01 11 getting him ready now. Are you doing this -- you're doing  
09:44:04 12 this witness?

09:44:05 13 MR. POMERANTZ: No, I am not, Your Honor.

09:44:06 14 THE COURT: Who is?

09:44:06 15 MR. POMERANTZ: Mr. Dane. Well, it's their  
09:44:09 16 witness, and Mr. Dane is crossing.

09:44:10 17 THE COURT: Yeah, I know. Are you  
09:44:10 18 cross-examining?

09:44:10 19 MR. POMERANTZ: Mr. Dane is cross-examining him.

09:44:12 20 THE COURT: I don't know why you can't go on  
09:44:14 21 and we can get -- we've got jury instructions and verdict  
09:44:17 22 forms and all kinds of things pending here. All kinds of  
09:44:20 23 motions and problems.

09:44:22 24 MR. POMERANTZ: Well, what we had proposed is  
09:44:24 25 that Your Honor take up those issues at 11:30, or whenever

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we're finished with Mr. Kaplan.

THE COURT: I don't want to be doing it then.

MR. POMERANTZ: Okay.

THE COURT: I want these people to have this case over like we told them it was going to be over.

MR. POMERANTZ: Okay. I understand, Your Honor. I will go back with Professor Shapiro now.

THE COURT: All right.

(End of sidebar discussion.)

THE COURT: Your next witness.

MR. PFEIFFER: Your Honor, Jeld-Wen calls as its next witness David Kaplan.

**DAVID P. KAPLAN,**

called at the instance of the defendant, having been first duly sworn, testified as follows:

MR. PFEIFFER: Your Honor, with the Court's permission, we have a small set of slides and potential exhibits in a binder for the witness and the Court.

THE COURT: Sure. Are we ready? Okay.

MR. PFEIFFER: Thank you, Your Honor.

**DIRECT EXAMINATION**

BY MR. PFEIFFER:

Kaplan - Direct

09:45:58 1 Q Good morning.

09:45:59 2 A Good morning.

09:45:59 3 Q Would you please state your name for the jury?

09:46:02 4 A David P. Kaplan.

09:46:03 5 Q And are you here to testify in the capacity of an  
09:46:06 6 expert witness today?

09:46:07 7 A Yes, sir.

09:46:07 8 Q Can you tell us what you do for a living?

09:46:11 9 A I'm an economist, and I principally provide economic  
09:46:14 10 consulting services to businesses.

09:46:16 11 Q And do those economic consulting services specialize  
09:46:19 12 in any particular areas?

09:46:20 13 A Yes. In the areas of antitrust economics and the  
09:46:23 14 analysis of damages in antitrust, and also the analysis of  
09:46:26 15 damages in commercial disputes, such as those involving  
09:46:31 16 alleged breach of contract.

09:46:32 17 Q How long have you been working in that field?

09:46:34 18 A About 30 years.

09:46:35 19 Q And where are you currently employed?

09:46:37 20 A I work at a firm called the Berkeley Research Group,  
09:46:41 21 which is an economic and financial consulting firm with  
09:46:44 22 over a thousand employees and offices across the U.S. and  
09:46:47 23 around the world.

09:46:48 24 Q Now, does that mean you're based in Berkeley like  
09:46:51 25 Professor Shapiro?

Kaplan - Direct

09:46:52 1 A No. I'm actually working out of the Washington,  
09:46:55 2 D.C., office.

09:46:56 3 Q And what is your position at that firm?

09:46:58 4 A I'm the executive director and the vice chairman of  
09:47:01 5 the company.

09:47:03 6 Q So then what is it that you do at the -- at Berkeley  
09:47:06 7 Research Group?

09:47:07 8 A I provide economic consulting services in the areas  
09:47:09 9 that I mentioned, antitrust and damage analysis. I also  
09:47:13 10 have administrative responsibilities in running the  
09:47:15 11 company.

09:47:15 12 Q Okay. What were you asked to do in this case?

09:47:19 13 A I was asked to review the damage analysis offered by  
09:47:22 14 Mr. Tucker related to both the contract issue and the  
09:47:27 15 alleged lost profits.

09:47:29 16 Q Without going into what they are, have you formed any  
09:47:32 17 opinions as a result of your work?

09:47:33 18 A I have.

09:47:34 19 Q And are you prepared to testify about those today?

09:47:36 20 A I am.

09:47:37 21 Q Would you please tell us about your educational  
09:47:39 22 background.

09:47:40 23 A Yes. I have a bachelor's and a master's in economics  
09:47:44 24 from George Washington University. And I also have a law  
09:47:47 25 degree from George Washington University.

Kaplan - Direct

09:47:49 1 Q Now, you have a law degree. Do you practice law?

09:47:52 2 A No. I've never practiced law.

09:47:53 3 Q Are you here today to provide any legal opinions?

09:47:56 4 A None whatsoever.

09:47:57 5 Q Now, you mentioned being an economist. Do you have  
09:47:59 6 any experience teaching in the field of economics?

09:48:02 7 A Yes. I taught for about ten years at George Mason  
09:48:04 8 University in Virginia, teaching a course in  
09:48:09 9 microeconomics, which focused on the analysis of  
09:48:12 10 competition. I also lectured in antitrust as part of that  
09:48:16 11 course that I taught for ten years.

09:48:19 12 Q And in the course of your teaching experience, have  
09:48:21 13 you touched on any areas that are related to the topic  
09:48:25 14 areas you would discuss in this case?

09:48:27 15 A Yes. In my teaching at George Mason, I would  
09:48:30 16 regularly teach about how changes in various business  
09:48:33 17 conduct, like pricing practices or mergers, would affect  
09:48:36 18 industries, markets and individual firms.

09:48:39 19 Q Apart from the ten years that you spent teaching at  
09:48:43 20 George Mason, do you have any other teaching experience?

09:48:45 21 A Yes. I taught for about ten years at Johns Hopkins  
09:48:48 22 University. I taught in the MBA program at Johns Hopkins.

09:48:54 23 Q And what subject areas did you teach there?

09:48:56 24 A I taught a course in business statistics for the MBA  
09:49:00 25 students.



Kaplan - Direct

09:49:00 1 Q And for approximately how long did you teach at Johns  
09:49:04 2 Hopkins?

09:49:05 3 A About ten years.

09:49:07 4 Q And were there aspects of what you taught at Johns  
09:49:09 5 Hopkins that are related to the opinions you would render  
09:49:12 6 in this case?

09:49:12 7 A Yes. The entire focus of the course that I taught  
09:49:15 8 was how to utilize statistical techniques to analyze and  
09:49:19 9 review data like sales, costs, and profits.

09:49:23 10 Q Okay. And apart from these longer term faculty  
09:49:25 11 positions at George Mason and Johns Hopkins, have you also  
09:49:30 12 served as a guest or visiting lecturer at other  
09:49:34 13 universities?

09:49:34 14 A Yes, I have. I've served as a guest lecturer at  
09:49:37 15 Columbia, at the University of Utah, and at George  
09:49:41 16 Mason -- excuse me -- George Washington University.

09:49:44 17 Q And have you ever had any of your academic work  
09:49:46 18 published?

09:49:46 19 A Yes. I've published a book in antitrust economics, a  
09:49:51 20 number of articles, including an article analyzing  
09:49:56 21 overcharges in an antitrust case.

09:49:58 22 Q Have you served as an economic consultant in the past  
09:50:00 23 to any government agencies?

09:50:02 24 A Yes, I have.

09:50:03 25 Q And did any of that work involve the analysis of

Kaplan - Direct

09:50:06 1 damages?

09:50:06 2 A Yes, it did.

09:50:07 3 Q Have you ever testified before Congress?

09:50:09 4 A Yes, I did, on antitrust issues.

09:50:12 5 Q Okay. Now, as a practicing economist, have you also  
09:50:14 6 made any presentations concerning economic and economic  
09:50:18 7 damages issues to any organizations?

09:50:20 8 A Yes, I have.

09:50:22 9 Q What types of organizations have you presented on  
09:50:24 10 those subjects?

09:50:25 11 A The American Bar Association, the Conference Board,  
09:50:28 12 the Brookings Institute. Places like that.

09:50:32 13 Q And some of those presentations involve the topics of  
09:50:36 14 damages?

09:50:36 15 A Yes. Four of them.

09:50:37 16 Q Okay. Now, have you ever testified previously in  
09:50:39 17 federal or state court on the issue of damages in  
09:50:42 18 litigation?

09:50:42 19 A Yes, I have.

09:50:44 20 Q How many times, approximately?

09:50:45 21 A About ten.

09:50:46 22 Q Okay. And in each of those instances, were you  
09:50:49 23 accepted by the Court as an expert on economic damages?

09:50:51 24 A Yes.

09:50:52 25 Q Now, did those cases include sometimes antitrust

Kaplan - Direct

09:50:55 1 damages?

09:50:56 2 A Yes.

09:50:56 3 Q Did they sometimes include contract damages?

09:50:59 4 A Yes.

09:50:59 5 Q Okay. And were there some cases where you were  
09:51:02 6 testifying on behalf of the plaintiff?

09:51:04 7 A Yes.

09:51:05 8 Q Other cases where you were testifying on behalf of  
09:51:07 9 the defendant?

09:51:08 10 A Yes.

09:51:09 11 Q Have you also testified in arbitration proceedings on  
09:51:12 12 issues related to damages?

09:51:13 13 A Yes.

09:51:15 14 Q Any other testimonial experience relevant to the  
09:51:18 15 issue of economic damages that we haven't talked about  
09:51:20 16 yet?

09:51:21 17 A Yes. I've also testified a fair number of times in  
09:51:24 18 cases related to class actions concerning antitrust and  
09:51:29 19 breach of contract. And there, a significant focus of my  
09:51:34 20 work is to analyze the proper methodologies to analyze  
09:51:38 21 damages in these types of matters, antitrust and contract.

09:51:41 22 Q Okay. And have you been, in the past, qualified as  
09:51:46 23 an expert on damages issues in that setting?

09:51:48 24 A Yes. I've testified in seven or eight trials. And  
09:51:51 25 these are trials in front of just a judge, without a jury,

Kaplan - Direct

09:51:54 1 where those judges have accepted me as an expert on the  
09:51:58 2 issue of damages.

09:51:58 3 Q And are there aspects of your work as an executive  
09:52:03 4 director and vice chair of Berkeley Research Group that  
09:52:06 5 also expose you, in the real world setting, to these kind  
09:52:09 6 of financial and damages issues?

09:52:11 7 A Yes. At the Berkeley Research Group, I regularly  
09:52:13 8 review in the real world, in my role as vice chairman,  
09:52:18 9 income statements, sales data, cost data, profit data.  
09:52:20 10 And I also analyze budgets and forecasts.

09:52:27 11 And before I joined the Berkeley Research Group, I  
09:52:30 12 also was part of another company that I helped found and  
09:52:33 13 build, took public and was an executive officer of the  
09:52:36 14 public company where I regularly dealt with income  
09:52:39 15 statements, cost data, profit data.

09:52:42 16 So not only is my academic expense and my practical  
09:52:46 17 experience relevant to the issues here, but in the real  
09:52:47 18 world as an executive, I've dealt with these issues many  
09:52:50 19 times.

09:52:50 20 MR. PFEIFFER: Your Honor, we tender Mr. Kaplan  
09:52:52 21 as an expert on economics and economic damages in this  
09:52:56 22 matter.

09:52:57 23 THE COURT: Is he thusly accepted in that area?

09:53:01 24 MR. DANE: Yes, Your Honor.

09:53:02 25 THE COURT: All right.

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Q Mr. Kaplan, you testified earlier that you had analyzed Mr. Tucker's opinions concerning damages and future lost profits in this case. Have you reached any --

MR. DANE: I'm sorry, Your Honor. I missed what counsel had said. We do not have an objection to Mr. Kaplan as an expert on economic damages. He's not offering an opinion as an economist in this case, however.

MR. PFEIFFER: I'm not sure I understand the difference, Your Honor. He's not offering opinions on liability in this case, if that's the question.

MR. DANE: Your Honor, he's not offering any opinions on economics, such as the antitrust issues that he testified were part of his background.

MR. PFEIFFER: I agree with that, Your Honor.

THE COURT: He'll be accepted -- he's just going to testify about damages and the calculations respecting damages?

MR. PFEIFFER: I believe that's correct, Your Honor.

THE COURT: That's what he's accepted as an expert, and the economics of the damage claims at issue in this case.

MR. PFEIFFER: Thank you, Your Honor.

Q Sorry, Mr. Kaplan. Back to --

THE COURT: Start over again.

Kaplan - Direct

09:54:05 1 MR. PFEIFFER: Yes. Thank you, Your Honor.

09:54:06 2 Q You mentioned earlier that you had been engaged to  
09:54:09 3 look at the work that Mr. Tucker had done in this case in  
09:54:12 4 terms of his assessment of damages and future lost profits  
09:54:16 5 damages?

09:54:16 6 A Yes. I've analyzed that.

09:54:18 7 Q Have you reached any opinions concerning what he did  
09:54:20 8 on those two issues?

09:54:21 9 A I have.

09:54:21 10 Q Have you prepared some slides to help illustrate and  
09:54:24 11 explain your testimony in this case?

09:54:25 12 A Yes, sir, I did.

09:54:27 13 MR. PFEIFFER: Gail, would you please call up  
09:54:28 14 the first Kaplan slide.

09:54:32 15 Q You have here a summary of your conclusions in this  
09:54:34 16 case. Would you please start with the first conclusion  
09:54:38 17 and explain to the jury what your opinion is.

09:54:40 18 A Yes. Mr. Tucker presented a damage calculation  
09:54:45 19 related to so-called defective door skins. It was  
09:54:51 20 approximately \$3 million. And that claim is based only on  
09:54:57 21 Steves' interpretation of the supply agreement, and it may  
09:55:02 22 well include -- improperly include the value of door skins  
09:55:05 23 and doors that are not reimbursable under that contract.

09:55:09 24 Q Okay. What, then, is your --

09:55:11 25 THE COURT: Wait just a minute.

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09:55:13 1 MR. PFEIFFER: Sorry, Your Honor.

09:55:14 2 THE COURT: Because he can't testify about what  
09:55:15 3 the meaning of the contract is.

09:55:16 4 MR. PFEIFFER: He's not going to testify --

09:55:18 5 THE COURT: He just did. He said it may include  
09:55:19 6 damages that may be -- not be reimbursable under the  
09:55:25 7 provisions of the contract, which is essentially an  
09:55:29 8 opinion that X damage, whatever X may end up being, is not  
09:55:34 9 within the scope of the contract. And no expert can  
09:55:37 10 testify about that.

09:55:38 11 MR. PFEIFFER: And we will make clear, he is not  
09:55:40 12 going to testify about that.

09:55:42 13 THE COURT: Well, then strike that answer and  
09:55:43 14 don't pay any attention to it, ladies and gentlemen.

09:55:47 15 Try again, Mr. Pfeiffer.

09:55:48 16 MR. PFEIFFER: Yes, Your Honor.

09:55:50 17 Q Your assessment of Mr. Tucker's supply agreement  
09:55:58 18 damages takes into account that Jeld-Wen has contended  
09:56:04 19 that some claims are not reimbursable, correct?

09:56:07 20 A That's correct.

09:56:08 21 Q And you'll be explaining the value of those items,  
09:56:12 22 correct?

09:56:13 23 A Yes. There's a difference of opinion between the two  
09:56:16 24 sides about how to interpret the contract.

09:56:18 25 THE COURT: Please. Just yes was enough.

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09:56:21 1 THE WITNESS: Yes, sir.

09:56:21 2 THE COURT: Please. Just answer the question,  
09:56:22 3 and you don't need to explain what the issues are between  
09:56:27 4 the sides. He'll ask you what he wants you to talk about.

09:56:33 5 THE WITNESS: Yes, sir.

09:56:34 6 THE COURT: Please confine your testimony to  
09:56:36 7 that.

09:56:36 8 Q Would you please describe your second opinion in this  
09:56:39 9 case?

09:56:39 10 A Yes. That the overcharge claim is based, again, on  
09:56:42 11 Steves' interpretation of the supply agreement.

09:56:46 12 MR. DANE: Objection, Your Honor.

09:56:47 13 THE COURT: What?

09:56:49 14 MR. DANE: This raises the same issue, Your  
09:56:51 15 Honor.

09:56:53 16 MR. PFEIFFER: I don't believe it does, Your  
09:56:54 17 Honor.

09:56:56 18 THE COURT: It depends on what he says,  
09:56:58 19 Mr. Dane. It may. He's saying he understands that  
09:57:02 20 Shapiro's testimony is based only on Steves'  
09:57:07 21 interpretation. Is that right?

09:57:10 22 MR. PFEIFFER: Yeah. Mr. Tucker's.

09:57:13 23 THE COURT: That isn't what this slide says.

09:57:15 24 This slide is a broader statement to which I think  
09:57:18 25 the objection is lodged, and that is, the overcharge claim



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09:57:21 1 is based on -- only on Steves' interpretation of the  
09:57:27 2 contract. It may be that other evidence besides Shapiro  
09:57:32 3 comes into play in deciding what it's based on or not  
09:57:36 4 based on. But what he's doing is addressing what Shapiro  
09:57:39 5 said, and I understood that that's what his opinion was,  
09:57:43 6 that in Shapiro's overcharged calculations -- or not  
09:57:48 7 Shapiro.

09:57:49 8 MR. PFEIFFER: Tucker, Your Honor.

09:57:49 9 THE COURT: Tucker. I keep getting that wrong.  
09:57:51 10 That Tucker's overcharge claim is based only on Steves'  
09:57:55 11 interpretation, and he -- I think that's what he's saying.

09:57:58 12 MR. PFEIFFER: Yes, Your Honor. I think that  
09:57:59 13 is --

09:57:59 14 THE COURT: Let's keep it -- let's get it tight.

09:58:02 15 MR. PFEIFFER: Yes, Your Honor.

09:58:02 16 THE COURT: Because you can drift into waters  
09:58:04 17 that are troubled.

09:58:06 18 MR. PFEIFFER: Yes, Your Honor. And I think  
09:58:07 19 when we get into the more detailed questions, we won't be  
09:58:11 20 anywhere near those waters.

09:58:15 21 THE COURT: Well, I know. But the problem is by  
09:58:16 22 the time you get into those waters, you may have already  
09:58:19 23 put some ink in big waters by the broad proposition. So  
09:58:25 24 that's why we need to be careful about the broad  
09:58:27 25 proposition.

Kaplan - Direct

MR. PFEIFFER: Yes, Your Honor.

Q Would you address now the third conclusion that you've reached in this case?

A Yes. In my opinion, Mr. Tucker's estimate of lost future profits is speculative and unreliable.

Q Now, to be clear, Mr. Kaplan, are you offering any opinions about whether Jeld-Wen actually breached any provision of its contract?

A I am not.

Q Are you offering any opinions about whether the acquisition of CraftMaster by Jeld-Wen was anticompetitive?

A I am not.

Q Did you prepare reports in the course of your work in this case?

A I did.

Q When were those submitted?

A I believe in April and in August.

Q And in general terms, what information did you rely on in forming the opinions that you reported in those reports?

A I obviously reviewed in detail Mr. Tucker's reports and analysis. I read all the depositions that were taken in the case. I looked at the documents that were produced in the case. I reviewed data produced in the case. I

Kaplan - Direct

also reviewed publicly available information.

Q And then during the course of this trial, have you either listened to or read the trial testimony that has occurred so far?

A Everything except for yesterday.

Q Now, Mr. Tucker also submitted a supplemental report the same time as you in August of last year, right?

A Yes. On August 21st.

Q So those were simultaneous?

A Yes.

Q Were you able, then, to respond, in a written report, to Mr. Tucker's supplemental August report?

A I was not.

Q Have you reviewed that report?

A Yes.

Q Now, did he change some of his calculations from his April report in his August report?

A Yes, he did.

Q In forming your opinions, did you consider those new calculations presented by Mr. Tucker?

A Yes.

Q Were you also here in the courtroom when Mr. Tucker testified last week?

A I was here for the whole time.

Q Now, in preparing your testimony today --

Kaplan - Direct

10:00:27 1 THE COURT: Just so we're straight, the jury --  
10:00:28 2 have you all admitted the reports of the experts?

10:00:31 3 MR. PFEIFFER: No, Your Honor. And we won't be.

10:00:32 4 THE COURT: Well, the testimony about what he  
10:00:33 5 testified about, then -- I mean the evidence on which he  
10:00:36 6 based his testimony and the figures will be what he  
10:00:38 7 testified to in court.

10:00:40 8 MR. PFEIFFER: Yes, Your Honor.

10:00:40 9 THE COURT: All right.

10:00:42 10 MR. PFEIFFER: Yes. That was merely to give  
10:00:43 11 background as to what he had studied in the case.

10:00:46 12 THE COURT: Well, I know, but it might confuse  
10:00:48 13 the jury because the jury is wondering, then, where is the  
10:00:49 14 report.

10:00:50 15 But you're not going to see any reports. It's the  
10:00:52 16 testimony that was given in court by Mr. Tucker and the  
10:00:55 17 testimony that's given in court by Mr. Kaplan that counts.

10:01:01 18 Q Has any of the additional information that you have  
10:01:04 19 considered since the time you submitted your August 2017  
10:01:08 20 report changed any of the opinions that you have in this  
10:01:11 21 case?

10:01:11 22 A None at all.

10:01:13 23 Q Okay. Could you remind us again what the categories  
10:01:20 24 are and the damages numbers that Mr. Tucker presented on  
10:01:23 25 the issue of the contract damages?

Kaplan - Direct

MR. PFEIFFER: And, Gail, would you please put up slide 2 for that purpose.

A Yes. Mr. Tucker provided two categories of damages related to the alleged breach of the supply agreement.

One related to defect costs. That's the \$3,081,040. And on what he called contract overcharges that were 8.6 million to 9.9 million.

Q And what explains that range between 8.6 million and 9.9 million on the overcharges?

A An alternative calculation that Mr. Tucker provided related to key input costs and a particular type of wood at the Towanda plant.

Q Let's start by taking a look at what Mr. Tucker says about the unpaid defect cost damage claim.

MR. PFEIFFER: Gail, would you put up Mr. Tucker's slide 15, please, from when he was here.

Q You recall that Mr. Tucker discussed this slide and the numbers on it when he was here?

A Yes.

Q And does this reflect what Mr. Tucker said were the damages he had calculated related to unpaid claims for defective products?

A Yes.

Q Let's start with the first category up there, the \$441,000. Does that calculation include claims for door

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10:02:53 1 skins that Jeld-Wen contends were not actually defective?

10:02:59 2 A It does.

10:03:00 3 Q And do you recall that there was testimony from

10:03:02 4 Mr. Gartner relating to that issue?

10:03:04 5 A I do recall it.

10:03:06 6 Q And what was the nature of that testimony?

10:03:07 7 A Mr. Gartner testified that Steves would evaluate a

10:03:13 8 pallet of door skins, which would be 225 door skins, and

10:03:17 9 they would look at the just the top 4. And if they

10:03:21 10 concluded that the top 4 were defective, they would send

10:03:25 11 the whole pallet back, claiming that the whole pallet was

10:03:30 12 defective, including the other 221 door skins even though

10:03:33 13 those door skins may not be defective at all.

10:03:38 14 Q And do you recall that Mr. Tucker also testified

10:03:41 15 about claims being submitted for some door skins that

10:03:43 16 Steves determined could be used?

10:03:46 17 A Yes. I remember that testimony.

10:03:51 18 Q If Mr. Tucker has included in his calculations of

10:03:55 19 defective door skins in that first item any amount of door

10:03:59 20 skins that were not actually defective, what impact does

10:04:02 21 that have on the reliability of that damages number?

10:04:07 22 A The -- the title of the category is "Defective Door

10:04:12 23 Skins." If it includes door skins that were not

10:04:15 24 defective, then it is an unreliable estimate of the

10:04:19 25 allegedly defective door skins.

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10:04:23 1 Q Has Mr. Tucker provided any alternative number to  
10:04:27 2 take into account; for example, Mr. Gartner's testimony?

10:04:30 3 A He has not.

10:04:31 4 Q Okay. Let's look at the next category that's listed  
10:04:34 5 there, the Steves doors with defective Jeld-Wen door skins  
10:04:37 6 category of approximately \$1.7 million.

10:04:40 7 A Yes, sir.

10:04:41 8 Q Did you prepare a summary of your opinions with  
10:04:43 9 respect to that category of damages?

10:04:45 10 A I did.

10:04:48 11 MR. PFEIFFER: Could we switch to slide 3,  
10:04:50 12 please. Thank you, Gail.

10:04:54 13 Q What are the items that you have summarized here with  
10:04:58 14 regard to issues with that category of Mr. Tucker's damage  
10:05:02 15 claim?

10:05:03 16 A I have four opinions related to this second category  
10:05:07 17 of the \$1.177 million. The first one is that the  
10:05:12 18 calculation is based not on the value of the door skin but  
10:05:17 19 on the value of the entire door. And I understand that  
10:05:19 20 Jeld-Wen maintains that it's only responsible to reimburse  
10:05:23 21 Steves for the value of the door skin, not the entire  
10:05:27 22 door. And if that conclusion is right, then the entire  
10:05:30 23 calculation of the 1.177 million is irrelevant to a  
10:05:36 24 damages analysis in this matter.

10:05:38 25 Q And has Mr. Tucker provided an alternative number

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10:05:41 1 that would be based on the value of the door skins rather  
10:05:44 2 than the doors themselves?

10:05:45 3 A He has not as part of this second category of damages  
10:05:50 4 calculations.

10:05:51 5 Q Would you turn to the second item that you've listed  
10:05:53 6 there?

10:05:53 7 A Yes. There's testimony by Mr. Tucker and Mr. Gartner  
10:05:57 8 that a significant number of the doors that are included  
10:06:00 9 in this damage category were not actually submitted for  
10:06:04 10 inspection to Jeld-Wen. And, again, Jeld-Wen maintains  
10:06:08 11 that unless they were submitted for inspection, that they  
10:06:12 12 cannot be, and are not, reimbursable under the supply  
10:06:17 13 agreement.

10:06:17 14 Q And did Mr. Tucker provide any alternative number  
10:06:20 15 that dealt with the issue of doors not being inspected?

10:06:23 16 A He did not.

10:06:29 17 Q If you'd turn to the third item on your list there.

10:06:31 18 A Yes.

10:06:31 19 Q What are you describing as a problem with  
10:06:33 20 Mr. Tucker's analysis of the defective door claim there?

10:06:37 21 A Yes. Mr. Gartner also testified that Steves may well  
10:06:41 22 miss defective door -- defective door skins when they're  
10:06:46 23 making a door. So the door skin is defective. They don't  
10:06:49 24 see it. They don't recognize it but yet they make the  
10:06:53 25 door.



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10:06:54 1 And it's my understanding that Jeld-Wen maintains  
10:06:57 2 that if Steves could have found the defective skin before  
10:07:01 3 it got put on the door, that Jeld-Wen should not be  
10:07:05 4 responsible to reimburse Steves for the entire value of  
10:07:09 5 the door when Steves could have found the defect before  
10:07:12 6 the door was made.

10:07:14 7 Q And, again, has Mr. Tucker provided any alternative  
10:07:17 8 calculation to his \$1.7 million calculation that takes  
10:07:22 9 into account the evidence of the ability to identify  
10:07:25 10 defects before they're made into doors?

10:07:29 11 A He did not.

10:07:30 12 Q If you'd turn to the fourth item on your list, what  
10:07:32 13 is that describing as a problem with Mr. Tucker's doors  
10:07:36 14 damages analysis?

10:07:37 15 A Yes. Again, Mr. Gartner testified here at trial that  
10:07:40 16 some of the doors included in this category could have  
10:07:44 17 been damaged in the assembly process at Steves. So it  
10:07:48 18 wasn't a defective door skin. It was actually damaged at  
10:07:51 19 the assembly process at Steves, or it could have been  
10:07:55 20 damaged -- the door could have been damaged at a customer  
10:07:58 21 location for reasons like moisture and things like that.

10:08:01 22 Q Did Mr. Tucker, in his damages calculations, provide  
10:08:04 23 any quantification of how many such doors fell into that  
10:08:07 24 category?

10:08:08 25 A He did not.

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Q Did he provide a quantification of how many doors  
fell into any of these categories?

A He did not.

Q What impact do these four criticisms have on the  
reliability of his \$1.7 million door damages claim?

A If Jeld-Wen's interpretation of the contract is  
accurate, then this category of damages is not reliable.

Q In its entirety?

A In its entirety.

THE COURT: Well, wouldn't it be the case that  
if Jeld-Wen's interpretation of the contract was correct  
and if your understanding or recitation of what the  
witness said was all that the witness said, then it would  
be an error?

THE WITNESS: Well, I --

THE COURT: Because you testified about what a  
witness said.

Now, why you didn't object to that, Mr. Dane, I don't  
know, but -- so I think that's the limitation on your  
testimony, is it not? You're basing it on your  
interpretation of what a witness testified, right?

THE WITNESS: Not entirely, sir.

THE COURT: I didn't ask you entirely. Are you  
basing it, period, on the interpretation of a witness at  
all?

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10:09:23 1 THE WITNESS: Partially, sir. Yes, sir.

10:09:24 2 THE COURT: Yes. That's exactly what I said you  
10:09:25 3 were doing. All right. That's enough. Go ahead.

10:09:29 4 Let's make sure it is proper expert testimony. He  
10:09:33 5 can't evaluate the testimony of other witnesses. He  
10:09:36 6 was -- what he was trying to do was to say X said Y and,  
10:09:40 7 therefore, if that was wrong -- was right, then there  
10:09:45 8 wasn't any accounting for it. And that's okay.

10:09:47 9 MR. PFEIFFER: Yes, Your Honor.

10:09:49 10 THE COURT: But he drifted into evaluating the  
10:09:52 11 testimony. So that's where the problem was.

10:09:57 12 Q Don't drift.

10:09:58 13 A I'll do my best.

10:10:01 14 MR. PFEIFFER: If we could turn back to  
10:10:03 15 Mr. Tucker's slide 15, please, Gail.

10:10:07 16 Q So we've looked at the first two items of the unpaid  
10:10:11 17 defect cost claim. The third item, would you describe  
10:10:15 18 what that is -- is talking about, according to Mr. Tucker?

10:10:19 19 A Yes. I understand from Mr. Tucker's testimony, this  
10:10:21 20 category related to the \$862,769 relates to door skins  
10:10:28 21 that were actually not defective when they were shipped by  
10:10:32 22 Jeld-Wen but were damaged in Steves' facilities.

10:10:37 23 Q And if that were the case, how would that affect the  
10:10:41 24 reliability of that estimate according -- in Mr. Tucker's  
10:10:45 25 sheet?

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10:10:45 1 A Again, I understand that it's Jeld-Wen's position  
10:10:47 2 that if the door skin wasn't defective when it was shipped  
10:10:51 3 by Jeld-Wen and Steves damaged it --

10:10:54 4 MR. DANE: Objection, Your Honor. This is  
10:10:55 5 getting into the same area where the witness is simply  
10:10:58 6 repeating testimony from a fact witness.

10:11:02 7 MR. PFEIFFER: I don't think he was actually  
10:11:03 8 repeating a fact witness.

10:11:04 9 THE COURT: He's talking about what their  
10:11:06 10 position is. Just have him explain why he doesn't think  
10:11:09 11 it's reliable. That's what he needs to do is confine his  
10:11:13 12 discussion to that.

10:11:14 13 Q Would you explain why you believe that item of  
10:11:15 14 Mr. Tucker's calculation is not reliable?

10:11:18 15 A I understand that it's Jeld-Wen's position that if  
10:11:20 16 the door skin was not defective when Jeld-Wen sent it to  
10:11:25 17 Steves and Steves caused it to be injured -- damaged, that  
10:11:29 18 it's not Jeld-Wen's responsibility to reimburse Steves for  
10:11:33 19 a door skin that wasn't defective when they sent it.

10:11:36 20 Q And did Mr. Tucker provide any quantification of how  
10:11:39 21 many door skins were damaged in the manner that you just  
10:11:46 22 described?

10:11:47 23 A No.

10:11:48 24 Q Okay. Did he provide any alternative calculation  
10:11:51 25 that would deduct out such door skins?

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10:11:54 1 A No.

10:11:54 2 Q Okay. If -- well, in summary, then, having gone  
10:12:00 3 through each of these three categories, what is your  
10:12:03 4 overall opinion regarding the reliability of this \$3 plus  
10:12:08 5 million in unpaid defect cost damages presented by  
10:12:12 6 Mr. Tucker?

10:12:13 7 A In my opinion, it -- if Jeld-Wen's interpretation of  
10:12:16 8 the contract is correct, then these numbers are unreliable  
10:12:19 9 and not a proper proxy for the alleged damages related to  
10:12:23 10 the defects in the doors.

10:12:26 11 Q Let's turn next to the contract overcharges component  
10:12:31 12 of Mr. Tucker's calculations.

10:12:33 13 MR. PFEIFFER: Gail, would you please put up  
10:12:34 14 Mr. Tucker's slide number 10.

10:12:37 15 Q You also recall having seen this slide used by  
10:12:40 16 Mr. Tucker when he testified?

10:12:42 17 A Yes.

10:12:42 18 Q Okay. Do you have an opinion on the reliability of  
10:12:46 19 Mr. Tucker's calculations in this regard?

10:12:49 20 A Yes.

10:12:49 21 Q What is your opinion?

10:12:51 22 A This calculation, again, is based on -- only on  
10:12:55 23 Steves' interpretation of the supply agreement, not  
10:12:58 24 Jeld-Wen's interpretation.

10:13:00 25 Q What is the --

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MR. DANE: Objection, Your Honor. That is not an answer relating to the reliability of the calculations. That is relating to the legal assumptions.

THE COURT: Yeah. Sustained. He cannot talk about this. He can talk about the mathematical problems with it and the economic underpinnings that he thinks are frail, but he can't link it and argue it as part of the theory of your case or the other side's case. That's not an expert's job.

MR. PFEIFFER: Yes, Your Honor.

THE COURT: And if he can't do that, if we have to have that, then maybe we won't have his testimony at all. So maybe you can retool a little bit.

And, Dr. Kaplan, you're going to have to frame your answers without arguing the case. Do you understand, sir?

THE WITNESS: Yes, sir.

Q Mr. Kaplan, when Mr. Tucker calculated the changes in Jeld-Wen's key input costs that you recall underlay these calculations --

A Yes.

Q -- did he include key input costs associated with the Towanda facility formerly owned by CMI?

A He did.

Q The one that Jeld-Wen acquired as part of the merger?

A He did.

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Q What is the effect on his overcharges calculations of including the Towanda facility in his analysis?

A It substantially increases those numbers.

Q Did you raise that issue in your report concerning Mr. Tucker's decision to include Towanda in his overcharge calculations?

A I did.

Q How did Mr. Tucker respond to that criticism of his numbers?

A He said that these numbers only relate to the contract claim, not the antitrust claim.

MR. DANE: Objection, Your Honor. That is a mischaracterization.

THE COURT: Sustained. He can't -- you can't testify to what somebody else said. You're trying to get him to testify about what he said in a report that's not in evidence, and you have to confine it to what was put on in the courtroom to begin with. But in that event, he still can't testify without linking it to the economic principles that are involved. And I sustain the objection because Mr. Dane is correct about it.

MR. PFEIFFER: Gail, would you please put up Mr. Tucker's slide 21.

Q You remember Mr. Tucker described what he was studying with this slide?

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10:15:41 1 A Yes.

10:15:41 2 Q And this was his calculations of the lost future  
10:15:44 3 profits damages claim?

10:15:46 4 A Yes.

10:15:47 5 Q Okay. Now, in this calculation -- in presenting this  
10:15:56 6 calculation, was there any suggestion that Steves had lost  
10:15:58 7 a single dollar of profits as of today?

10:16:00 8 A None.

10:16:01 9 Q Okay. Was there a suggestion that Steves would lose  
10:16:05 10 a single dollar of profits between today and September of  
10:16:08 11 2021?

10:16:09 12 A No. He actually calculated that Steves would earn  
10:16:12 13 \$60 million in before tax profits between today and  
10:16:17 14 September 2021. \$60 million, in addition to another  
10:16:23 15 \$20 million in executive compensation paid to Edward and  
10:16:27 16 Sam Steves.

10:16:27 17 MR. DANE: Objection, Your Honor.

10:16:28 18 THE COURT: Excuse me. Yes.

10:16:31 19 MR. DANE: Your Honor, the witness has just  
10:16:33 20 testified to something that is not profits in this case.  
10:16:35 21 He is attempting to inject argument into his answers. I  
10:16:38 22 would ask that the witness be instructed to please answer  
10:16:42 23 the questions and limit himself to the issues in the case.

10:16:45 24 MR. PFEIFFER: Your Honor, that evidence was  
10:16:47 25 exactly what Mr. Tucker did testify to. It is evidence in



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10:16:49 1 the case. It is part of the issue of his damages  
10:16:51 2 calculation.

10:16:55 3 MR. DANE: Your Honor --

10:16:57 4 THE COURT: I am assuming, though, that you're  
10:16:57 5 going to ask him what's wrong with that?

10:17:00 6 MR. PFEIFFER: Yes, Your Honor. We're going to  
10:17:01 7 ask what's wrong with all of this. Yes.

10:17:03 8 MR. DANE: Your Honor, my objection is the  
10:17:04 9 question related to profits. His answer was not limited  
10:17:08 10 to profits. He talked about executive compensation. That  
10:17:12 11 has nothing to do with the profits of the party in this  
10:17:13 12 case and nothing to do with the recovery that's being  
10:17:19 13 sought here.

10:17:20 14 THE COURT: He volunteered something you didn't  
10:17:22 15 ask for. You asked for profits. Your question was  
10:17:25 16 correct. The answer, insofar as he gave it, as to profits  
10:17:29 17 was correct. Then he added executive compensation.

10:17:37 18 You are just instructed to disregard that testimony.  
10:17:39 19 The objection is sustained as to that testimony. As to  
10:17:44 20 the testimony about what he understood Mr. Tucker  
10:17:47 21 calculated the profits to be in the period of time he  
10:17:50 22 testified to, you may consider that.

10:17:53 23 MR. PFEIFFER: Thank you, Your Honor.

10:17:55 24 Q Have you reached an overall conclusion about the  
10:17:58 25 reliability of Mr. Tucker's claim that Steves will lose

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10:18:03 1 future profits beginning in September of 2021?

10:18:06 2 A I have.

10:18:07 3 Q And have you prepared a summary of your conclusions?

10:18:09 4 A Yes.

10:18:11 5 MR. PFEIFFER: Gail, would you please put up

10:18:12 6 slide 4.

10:18:15 7 Q Does this present the summary of your conclusions?

10:18:17 8 A Yes.

10:18:18 9 Q Okay. Would you please explain the first

10:18:22 10 conclusion --

10:18:23 11 THE COURT: Which is his slide number? What

10:18:26 12 number is that?

10:18:27 13 MR. PFEIFFER: This would be slide 4 in

10:18:29 14 Mr. Kaplan's slides, Your Honor.

10:18:31 15 THE COURT: Excuse me. Go ahead.

10:18:34 16 Q Could you explain your conclusion number 1 listed

10:18:36 17 there?

10:18:36 18 A Yes. Mr. Tucker's calculation of lost future profits

10:18:41 19 is entirely based on an assumption that Steves will not

10:18:45 20 have a door skin supply in September 2021. And if it does

10:18:52 21 have a supply, then the lost profit estimates are moot and

10:18:55 22 irrelevant.

10:18:58 23 Q And when you say the lost profits are moot, what does

10:19:03 24 that mean?

10:19:04 25 A It means that if Steves is able to obtain a supply of

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10:19:10 1 door skins according to Mr. Tucker's analysis, they will  
10:19:13 2 not go out of business and will not have any lost profits.

10:19:17 3 Q And did Mr. Tucker provide any independent analysis  
10:19:20 4 to assume -- to support, rather, his assumption that  
10:19:24 5 Steves will not have a supply of door skins?

10:19:26 6 A He did not.

10:19:28 7 Q Did he testify about the basis for that assumption?

10:19:31 8 A He did not.

10:19:33 9 Q Have you reviewed evidence, without getting into it,  
10:19:36 10 that is inconsistent with Mr. Tucker's assumption?

10:19:40 11 MR. DANE: Objection, Your Honor.

10:19:43 12 THE COURT: Basis for the objection is?

10:19:45 13 MR. DANE: This was the assumption Mr. Tucker  
10:19:47 14 made, Your Honor, precisely because this is a topic as to  
10:19:52 15 which it would be improper for a damages expert to express  
10:19:56 16 an opinion. And Your Honor has already held that these  
10:20:02 17 damages experts are not to vouch for or comment on the  
10:20:06 18 evidence that relates to this issue, which is something  
10:20:08 19 that the jury is going to be determining.

10:20:11 20 MR. PFEIFFER: Your Honor, the reason --

10:20:12 21 THE COURT: You're saying that the evidence that  
10:20:14 22 supports these assumptions comes from the testimony of  
10:20:20 23 other witnesses, and it's improper for any expert to  
10:20:23 24 evaluate that evidence because that's not their line of  
10:20:27 25 work and that's not that's not why he was -- a damage

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expert was hired in the case? They cannot -- he can't attack the assumptions. You can attack the assumptions all you want to with other evidence, but this witness can't. Is that your objection?

MR. DANE: Yes, it is, Your Honor.

THE COURT: All right. So you say what?

MR. PFEIFFER: Your Honor, it is actually the province of experts to determine whether there is any reasonable basis for their assumptions. They are not merely supposed to take assumptions that are obviously inconsistent with evidence in the record. In fact, that's a basis for striking testimony of experts when they do that. And so the question of --

THE COURT: And none of this has anything to do with what we're talking about. So maybe you can go on and get to the point.

MR. PFEIFFER: Yes, Your Honor.

THE COURT: Your testimony is that he can evaluate the validity vel non of whether somebody else actually is going to provide a supply? Is that what you want him to --

MR. PFEIFFER: No, Your Honor. That's actually not what --

THE COURT: No. You cannot do that.

MR. PFEIFFER: And that's not what I want him to

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do.

THE COURT: What do you want him to do?

MR. PFEIFFER: I want him to offer the opinion as an expert who has testified in numerous damages cases whether --

THE COURT: How about just, I want him to offer an opinion on X. Maybe you better come up here.

MR. PFEIFFER: Yes, Your Honor.

THE COURT: You don't need to argue the case and make a response to the objection.

(Discussion at sidebar as follows:)

THE COURT: What do you want him to do? Because he has a real penchant for running off the reservation. And I'm troubled by it, and I don't want to get into something that we have to strike.

MR. PFEIFFER: He's an advocate, Your Honor.

MR. DANE: Could I finish my position, please?

THE COURT: What's the opinion you want to elicit?

MR. PFEIFFER: I want him to say that from the perspective of a damages expert, it's not appropriate to simply take assumptions and not test whether they match the evidence in the case.

THE COURT: But are you then going to ask him whether he tested them?

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10:22:15 1 MR. PFEIFFER: No.

10:22:17 2 THE COURT: He can ask him that.

10:22:18 3 MR. DANE: Your Honor, that creates --

10:22:20 4 THE COURT: Wait just a minute.

10:22:20 5 MR. DANE: I'm sorry, Your Honor.

10:22:20 6 THE COURT: Why can't he answer that -- ask that  
10:22:22 7 question?

10:22:25 8 MR. DANE: Because, Your Honor, it is suggesting  
10:22:26 9 improperly to the jury that there's a deficiency in  
10:22:29 10 Mr. Tucker's opinion because he -- first of all --

10:22:33 11 THE COURT: I don't think it's suggesting it. I  
10:22:36 12 think it's pointing it out.

10:22:38 13 MR. DANE: Yes. Yes.

10:22:38 14 THE COURT: That's the purpose.

10:22:39 15 MR. DANE: This is exactly what Your Honor -- at  
10:22:40 16 the pretrial conference, we had extended discussion about  
10:22:43 17 this on the lost profits motion. And we made clear  
10:22:47 18 there's a distinction between the opinions as to the  
10:22:49 19 amount of the lost profits, the performance of the  
10:22:51 20 company, how you project those, which both damages experts  
10:22:54 21 are expressing an opinion about, and the assumption of  
10:22:57 22 alternate supply, which they are not qualified to express  
10:23:01 23 an opinion about and where their only opinions would be  
10:23:04 24 reviewing and vouching the evidence.

10:23:05 25 And Mr. Kaplan commented on this evidence in his

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report.

THE COURT: He's not going to here.

MR. DANE: But if he testifies, Your Honor --  
he -- he asked him -- I mean, this is extremely devious of  
Mr. Pfeiffer.

MR. PFEIFFER: I beg your pardon.

THE COURT: Whoa. Whoa. Whoa. Whoa. Whoa.  
You know, Mr. Pfeiffer may have done something that you  
don't think is right --

MR. DANE: I apologize.

THE COURT: -- but the ascription of motivation  
to him is not right.

MR. DANE: Okay. I'm sorry.

THE COURT: And you owe him an apology.

MR. DANE: I apologize. I apologize.

MR. PFEIFFER: Thank you.

THE COURT: What?

MR. PFEIFFER: I just said thank you, Your  
Honor. That's all I said.

THE COURT: No. I'm --

MR. DANE: I apologized.

The original question, Your Honor, was now Mr. Tucker  
didn't do any independent evaluation of whether or not  
Steves would be able to get supply?

THE COURT: Yeah.

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10:23:50 1 MR. DANE: Well, that's not an opinion he  
10:23:51 2 properly should give, and he wouldn't be allowed to give  
10:23:54 3 that opinion. So to ask him first, Mr. Tucker didn't do  
10:23:58 4 this -- didn't offer this opinion. The question that  
10:24:02 5 Mr. Pfeiffer asked that was pending on my objection was,  
10:24:05 6 And have you reviewed evidence that's inconsistent with  
10:24:08 7 Mr. Tucker's assumption?

10:24:09 8 THE COURT: Yeah. That's the problem.

10:24:11 9 MR. PFEIFFER: I will reframe the question.

10:24:13 10 THE COURT: He cannot do that.

10:24:14 11 MR. PFEIFFER: I will not have him do that.

10:24:16 12 THE COURT: All he can say is, in calculating a  
10:24:18 13 damage for future lost profits, is it proper for an expert  
10:24:26 14 to make assumptions about whether they are going to stay  
10:24:33 15 in business or not, or whether there's a source of supply.  
10:24:36 16 That's all.

10:24:38 17 MR. PFEIFFER: Without assessing whether those  
10:24:39 18 are reasonable under the circumstances. Because that is  
10:24:43 19 what experts are supposed to do, and the case law is  
10:24:46 20 clear.

10:24:47 21 THE COURT: Actually, that's not -- they can, in  
10:24:49 22 fact, make assumptions.

10:24:54 23 MR. DANE: It would also be very --

10:24:55 24 THE COURT: They make assumptions.

10:24:56 25 MR. DANE: It would also be very misleading if



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10:24:58 1 that question were asked, Your Honor, because Mr. Tucker  
10:25:02 2 testified, as Mr. Pfeiffer well knows, that he did -- he  
10:25:12 3 wasn't expressing an opinion as to the availability of  
10:25:14 4 alternative supply, but he did review the evidence  
10:25:16 5 relating to that issue and that he felt confident that he  
10:25:18 6 was making a responsible assumption. So to ask this  
10:25:21 7 witness a question to suggest that Mr. Tucker did not do  
10:25:24 8 that would be extremely misleading when this is --

10:25:26 9 THE COURT: Well, you can argue that.

10:25:28 10 MR. PFEIFFER: And he's just said now that  
10:25:33 11 Mr. Tucker has suggested that he conducted an analysis  
10:25:34 12 when, in fact, he said I assumed it.

10:25:35 13 THE COURT: He reviewed to assess whether the  
10:25:37 14 assumptions were reasonable.

10:25:41 15 MR. PFEIFFER: That's correct.

10:25:41 16 THE COURT: And you want him to say that you  
10:25:42 17 have to conduct an assessment as to whether they are  
10:25:46 18 reasonable.

10:25:47 19 MR. PFEIFFER: Yeah. That takes into account  
10:25:49 20 the evidence in the case.

10:25:51 21 THE COURT: Objection overruled as to that  
10:25:53 22 question and that question only.

10:25:57 23 MR. PFEIFFER: Yes, Your Honor.

10:25:57 24 THE COURT: And no more beyond that.

10:25:59 25 MR. PFEIFFER: Yes, Your Honor. Thank you.

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(End of sidebar discussion.)

THE COURT: All right.

MR. PFEIFFER: May I proceed, Your Honor? Thank you.

Q In your work as an expert in damages, is it appropriate for an expert to assume certain facts without looking to see whether the assumptions they are making are reasonable in light of the evidence in the case?

A Not in my opinion.

Q Let's turn to the future lost profits claim that we have up here. You have your summary of conclusions. The first one we talked about, which is the assumption that Steves will not have a supply. And then item number 2 says based on the conclusion that Steves would go out of business without a supply of door skins and receive no value for its business?

A Yes, sir.

Q What are you referring to as "receive no value for its business"?

A Yes. In Mr. Tucker's calculations, he projects alleged lost future profits beginning September '21 through 2029. But he does not consider that Steves, if it were, in fact, forced out of business, could receive value for assets that it had at the time that it could sell. And that is actual real money to Steves that should be

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offset against a damage claim.

Q And when you say assets it could sell, what are you referring to?

A Well, Steves has three door plants. It has a brand name. It has other assets that have value.

Q And you're saying if it went out of business, as is the assumption here, what would you expect to have happen as an economist and a damages expert?

A That Steves would attempt to sell those assets and get the most for them that they could.

Q And did Mr. Tucker include any value whatsoever for, when the business going out of business, selling its assets?

A He did not.

Q From an economics perspective -- economic damage perspective, what would be the implications of awarding future lost profits today if Steves were, in fact, able to obtain a sufficient supply of door skins and remain in business?

A It would allow Steves to collect twice for the same damages.

Q And was this an issue that you raised in your reports in this case?

A Absolutely.

Q Did Mr. Tucker respond to that?

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10:28:43 1 A He did not.

10:28:46 2 Q If we turn back to your slide 4 here, and if you'd  
10:28:52 3 look at the third bullet on slide 4?

10:28:54 4 A Yes, sir.

10:28:55 5 Q You say there that Mr. Tucker's actual calculations  
10:28:58 6 are speculative and unreliable?

10:29:00 7 A I do.

10:29:01 8 Q Can you explain what you mean by that, sir?

10:29:03 9 A That the numbers cannot be relied on from an economic  
10:29:08 10 standpoint to reflect actual damage to Steves. They are  
10:29:13 11 simply too speculative.

10:29:14 12 Q And have you looked at some of the key aspects of the  
10:29:18 13 variables he used that were speculative?

10:29:20 14 A Yes, I did.

10:29:22 15 MR. PFEIFFER: Would you please put up slide 6,  
10:29:24 16 Gail.

10:29:27 17 Q These -- this slide represents what you think are the  
10:29:29 18 key variables that create problems in the reliability and  
10:29:35 19 speculativeness of his work?

10:29:37 20 A Yes, these are.

10:29:37 21 Q Would you start with the first one there, housing  
10:29:39 22 starts? What did you conclude with regard to Mr. Tucker's  
10:29:42 23 use of housing starts to estimate Steves' future lost  
10:29:46 24 profits?

10:29:46 25 A Mr. Tucker uses housing starts as a predicate for

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10:29:51 1 estimating what Steves' revenues will be in the future,  
10:29:55 2 and the housing starts estimate that he provides through  
10:29:58 3 2029 is itself speculative. It's not reliable.

10:30:04 4 Q So to be clear, as part of his analysis, he projected  
10:30:09 5 what future levels of housing starts would be through a  
10:30:12 6 period 12 years after he did those calculations in 2017?

10:30:15 7 A Yes.

10:30:15 8 Q Okay. And why do you say those are unreliable?

10:30:19 9 A Because the -- we could actually look at them. That  
10:30:23 10 would be quite helpful, Mr. Pfeiffer, but the --

10:30:26 11 Q Let's do that, then. Let's be helpful.

10:30:29 12 MR. PFEIFFER: Would you please put up  
10:30:30 13 Mr. Tucker's work paper 12D(s).

10:30:36 14 Q This is one of Mr. Tucker's calculations in his  
10:30:40 15 assessment of future lost profits, right?

10:30:43 16 A Yes. This work paper is the basis for Mr. Tucker's  
10:30:46 17 estimate of both housing starts and Steves' sales for 12  
10:30:51 18 years into the future.

10:30:52 19 Q And so what's the relationship, as Mr. Tucker has  
10:30:55 20 done this, between the housing starts and Steves' sales?

10:31:00 21 A Mr. Tucker maintains that Steves' sales are related  
10:31:04 22 to housing starts, and so he starts by first estimating  
10:31:09 23 housing starts to get a basis to estimate Steves' sales.

10:31:13 24 Q Could you show us where he projects housing starts on  
10:31:17 25 this document?

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10:31:17 1 A Yes.

10:31:19 2 THE COURT: You can actually draw on that, if  
10:31:21 3 you put your finger on it and circle where you're talking  
10:31:26 4 about, if you want to.

10:31:26 5 THE WITNESS: Thank you, Your Honor.

10:31:28 6 MR. PFEIFFER: Nice. Thank you, Your Honor.

10:31:29 7 THE WITNESS: I'm not sure my drawing is very  
10:31:32 8 good, sir, but --

10:31:33 9 THE COURT: You get an A.

10:31:36 10 A So -- I'm sorry, Mr. Pfeiffer.

10:31:37 11 Q So what is it that you've circled here in yellow with  
10:31:41 12 your figures?

10:31:42 13 A Yeah. So these are projected housing starts  
10:31:45 14 beginning in 2017. So that you see the number there, the  
10:31:48 15 1.2 million. And they continue all the way through 2027.  
10:31:54 16 The document has another page. So 2028 and 2029 are in  
10:31:59 17 the next page.

10:32:00 18 But what you see here is that Mr. Tucker is  
10:32:03 19 estimating that the number of housing starts in the United  
10:32:05 20 States as a whole is going to go up every single year, all  
10:32:09 21 the way up through 2022 to 1.5 million housing starts and  
10:32:16 22 then never go down for another 7 years.

10:32:20 23 Q So for the 12-year period, he has it going up to a  
10:32:23 24 certain point and then never ever going down?

10:32:26 25 A Never ever going down.

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Q Do you believe that projection is a reliable estimate of future housing starts?

A Absolutely not.

Q Why not?

A Well, if we could, and if I could --

THE WITNESS: Your Honor, if I could circle another column?

THE COURT: I think you can.

A So what I've --

Q What have you just circled now?

A What I've just circled now is actual -- actual housing starts for the 10-year period before Mr. Tucker begins his projection of what they might be for 12 years. And if we look at what happened to actual housing starts based on Mr. Tucker's own calculations, what actually happened in the real world, you see that the housing starts to climb dramatically from 2007 from well over a million dollars to around 500,000. They stayed very low. And all the way through 2016, every single one of those numbers in the real world are below the numbers that Mr. Tucker says are going to happen for the next 12 years in the future.

Q And is --

THE COURT: Excuse me. You said well over a million dollars. You mean well over a million starts?

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THE WITNESS: Yes, sir. Thank you, Your Honor.

Q And is the problem that housing starts tend to be cyclical with ups and downs as the economy itself experiences?

A Absolutely.

Q Okay. And would you expect that to happen in the future at some point over a 12-year period out?

A Yes. The concept of a business cycle in the American economy where things go up or down, we have recessions, we have good periods, that's what's reflected in the real world. It's not reflected in what Mr. Tucker projected is going to happen in the future. They are totally inconsistent.

MR. PFEIFFER: Gail, do you know how we get rid of those little marks for now?

THE COURT: I think we get -- yeah. I think there's a place up there at the top.

THE CLERK: I can do it, Your Honor.

THE COURT: Okay. You did it. Did you find it?

MR. PFEIFFER: Yes. Gail got it. Thank you, Your Honor.

THE COURT: We can do it here and we can do it there, but we'll let --

Q The reason I had those erased, as beautiful as your artwork was, was because I want you to draw again. Is



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10:34:38 1 there a similar problem, then, with Mr. Tucker's  
10:34:43 2 projection of Steves' future revenues?

10:34:44 3 A Yes.

10:34:45 4 Q Would you explain that problem?

10:34:46 5 A Yes. So, again, remember that he first begins with  
10:34:50 6 the housing starts as a basis to project the revenue that  
10:34:54 7 Steves will earn. Now, this is not their profits. This  
10:34:57 8 is their sales, when they sell doors. But there's a  
10:35:00 9 column here that I'll circle, and you'll see the column  
10:35:08 10 heading is "Projected Steves' Revenues."

10:35:11 11 So what Mr. Tucker is doing here, beginning in 2017,  
10:35:14 12 is he's saying that he can reliably predict what Steves'  
10:35:20 13 sales are going to be year after year after year for the  
10:35:24 14 next 12 years into the future. And what he projects, as  
10:35:29 15 you can see in this exhibit, is that their sales are going  
10:35:32 16 to grow from 216 million up to well over 300 million. And  
10:35:38 17 the increase is consistently higher. Every year is  
10:35:43 18 higher. No decline in sales. No evening off of sales.  
10:35:47 19 Every single year, he's projecting that Steves will have  
10:35:51 20 good times and their sales will always go up.

10:35:55 21 Q And, again, if you look at the historical data that  
10:35:59 22 Mr. Tucker has himself presented in this very document, is  
10:36:03 23 that assumption of always going up to a certain point and  
10:36:07 24 never going down consistent with what was experienced in  
10:36:11 25 the ten-year period immediately before he starts his

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projection?

A Absolutely not.

Q Could you circle that and explain?

A So just like I did with the housing starts, I looked at Mr. Tucker's own data in his own work paper -- that's the basis for his analysis -- and I said to myself, is it reasonable to assume and predict that Steves' sales are simply going to increase all the time and go up way over \$300 million? And I said, let's look at what really happened. Let's look at the ten years before the projection, what actually happened.

And, again, you can see, just like with housing starts, that Steves' sales declined significantly between 2007 and 2009, 2010 to below a hundred million dollars. And that decline is not reflected in any of the projections that are also included here where he has the sales going up every single year. And their sales in the real world, not only did they go down, but they never got above 200 million. They never got the \$300 million. That's the basis of Mr. Tucker's estimate. So these actual real world evidence, what actually happened, is totally inconsistent with Mr. Tucker's projection of what he thinks is going to happen.

Q And Mr. Tucker used as his -- his formula, essentially, is to take the number of housing starts as a

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starting point for the sort of available market that

Steves would be able to sell to?

A Yes.

Q But he also had pricing assumptions that entered into this revenue?

A Yes, he did.

Q And did he look, in connection with his work, at how much Steves' pricing had increased since the merger up to the present time?

A Well, embedded in these actual sales numbers, if we could look at 2012 to 2016, you see that their sales did go up. I'm not quarreling with that. His projection ignores the decline because his numbers keep going up. But their sales did go up between 2012 and 2016. And he did look at that.

Q And he also looked at when their sales went up, that was, in part, because their pricing increased, correct?

A Yes. They substantially raised their price of doors between 2012 and 2016. They actually raised their price of doors by 26 percent. Between -- after the merger, they substantially raised their price of doors 26 percent. And that's why these sales are -- one of the main reasons these sales are going up.

MR. DANE: I want to ask that that testimony be stricken.

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THE COURT: Why is that?

MR. DANE: May I approach?

THE COURT: Yeah.

(Discussion at sidebar as follows:)

MR. DANE: Your Honor, this is precisely the Hanover Shoe issue. He's testifying now about how they increased prices of doors after the merger. This is completely improper.

MR. PFEIFFER: Your Honor, this is a calculation that Mr. Tucker did. It's nothing to do with Hanover Shoe. We're not claiming they weren't injured. It's a basis for understanding how he gets to his higher revenue numbers. It's not simply housing starts.

THE COURT: I think Tucker explained how he did it the same way this guy did it.

MR. PFEIFFER: I think so, too, Your Honor.

THE COURT: Objection is overruled.

MR. PFEIFFER: Thank you, Your Honor.

(End of sidebar discussion.)

THE COURT: You may consider the evidence. Go ahead.

MR. PFEIFFER: Thank you, Your Honor.

Q Did you also, Mr. Kaplan, look at whether there were any problems with Mr. Tucker's lost profits modeling from the perspective of a sensitivity analysis?

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10:40:12 1 A Yes. Yes, I did.

10:40:15 2 Q And could you explain basically what a sensitively  
10:40:19 3 analysis means?

10:40:19 4 A Yes. In addition to asking ourselves whether the  
10:40:22 5 projections are consistent with the real world evidence,  
10:40:25 6 what actually happened, the other thing we want to do in  
10:40:29 7 evaluating the quality and the reliability of the  
10:40:32 8 projection is to ask ourselves as to whether the  
10:40:36 9 projection is sensitive. Otherwise -- in other words,  
10:40:39 10 does it change a lot if we make changes in various numbers  
10:40:44 11 with respect to the projection? Did the damage numbers  
10:40:50 12 change a lot if we change cost, for example, a little bit?  
10:40:56 13 If the numbers change a lot, it means that we can't have  
10:40:59 14 high confidence that the number that actually is included  
10:41:01 15 in the projection is reliable. It shouldn't be sensitive  
10:41:04 16 to small changes.

10:41:07 17 MR. PFEIFFER: Gail, you can take that slide  
10:41:09 18 down.

10:41:09 19 Q And did you examine -- whoops.

10:41:15 20 THE WITNESS: Can I keep that, Your Honor?

10:41:17 21 THE COURT: If you can print it, you can have  
10:41:20 22 it. There's a section of the Virginia Museum that might  
10:41:23 23 find it appropriate.

10:41:27 24 MR. PFEIFFER: It would be helpful if  
10:41:28 25 someone can -- oh, thank you. Thank you very much.

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10:41:32 1 A I figured it out, Mr. Pfeiffer.

10:41:34 2 Q So was there work done in this case that enabled you  
10:41:38 3 to determine whether Mr. Tucker's work, in fact, suffered  
10:41:42 4 from the flaw you just described that it was highly  
10:41:45 5 sensitive to small changes in inputs?

10:41:48 6 A Absolutely.

10:41:49 7 Q And what was it that you looked at in that regard?

10:41:52 8 A Well, I started by looking at Mr. Tucker's change in  
10:41:56 9 numbers that he actually presented that prove how  
10:41:59 10 sensitive his calculations are to small changes in  
10:42:03 11 variables that are part of his model.

10:42:05 12 Q When you say his change in numbers, can you explain  
10:42:07 13 what you mean?

10:42:08 14 A Yes. In his first two reports, Mr. Tucker provided  
10:42:12 15 estimates of the lost profits. He said in those reports  
10:42:17 16 that those estimates were conservative. But then in his  
10:42:21 17 lost report in August, he substantially changed those  
10:42:24 18 numbers and had to reduce them. In other words, the  
10:42:27 19 numbers that he said were conservative were actually not  
10:42:30 20 conservative. They were too high.

10:42:32 21 Q Let me take you back a step before we get to that.  
10:42:35 22 What financial data was it that Mr. Tucker relied on in  
10:42:39 23 his first report that he had said was conservative? What  
10:42:42 24 data set?

10:42:43 25 A He used data from just the year 2015 from Steves'

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10:42:47 1 financials to then project what Steves' costs and profits  
10:42:52 2 are going to be from that one year for 12 years into the  
10:42:55 3 future.

10:42:56 4 Q Okay. And that was in April of 2017?

10:42:58 5 A Yes.

10:42:58 6 Q Then in August of 2017, he used a different data set?

10:43:03 7 A Yes. He used --

10:43:05 8 Q What did he use?

10:43:06 9 A He had, in -- by August, he had received an  
10:43:09 10 additional 14 months of actual cost in profit data from  
10:43:14 11 Steves' financials that ended in February of 2017. So  
10:43:18 12 when he did his first report, he had data for 2015.  
10:43:22 13 That's what he used, but then --

10:43:24 14 THE COURT: Excuse me. We're not grading the  
10:43:26 15 reports. The issue is what did he use in what he  
10:43:30 16 testified to. And it makes no difference if he gave three  
10:43:34 17 different versions of things based on changing data that  
10:43:37 18 he received. We're not grading that process. What we're  
10:43:42 19 doing is looking at what he testified to in court. And  
10:43:44 20 that's all that you ask about. Otherwise we're back into  
10:43:49 21 the report problem again.

10:43:50 22 MR. PFEIFFER: May we approach, Your Honor,  
10:43:50 23 because I think this is something different?

10:43:52 24 THE COURT: It's not something different.

10:43:54 25 MR. PFEIFFER: It actually relates to the

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sensitivity analysis, Your Honor.

THE COURT: Take what sensitivity analysis he applied to what was testified to in court. That's what makes the difference. If he made -- suppose he made a sensitivity analysis in the first process, or didn't, and then in the second he did but he used a different figure. It doesn't make any difference. It's what he said in court that counts.

MR. PFEIFFER: And, Your Honor, if I may, this goes directly to what he said in court.

THE COURT: No, it doesn't. You're talking about -- you get there another way. You're grading the reports, and that's not available to the jury. They are not even -- they can't even look at them. So it's unfair to have the testimony talk about the reports when what he ought to be talking about is what the man's testimony was in court.

MR. PFEIFFER: Well, Your Honor, I'd still like to approach on this so I could explain. May I approach?

THE COURT: This is your last Ito approach. Come on.

MR. PFEIFFER: Thank you, Your Honor.

THE COURT: I mean, really and truly, you've just got to accept something as a result of the decision.

(Discussion at sidebar as follows:)



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10:45:03 1 THE COURT: What is it?

10:45:07 2 MR. PFEIFFER: Your Honor, we are not grading  
10:45:08 3 his reports.

10:45:10 4 THE COURT: You are.

10:45:10 5 MR. PFEIFFER: It's a sensitivity analysis that  
10:45:12 6 he did that relates to the final figure that he presented.

10:45:15 7 THE COURT: Then he can say he did sensitively  
10:45:18 8 analyses and they changed over time.

10:45:20 9 MR. PFEIFFER: Okay.

10:45:21 10 THE COURT: And that's all you can say.

10:45:24 11 MR. PFEIFFER: Okay.

10:45:25 12 THE COURT: Because you need to apply to what  
10:45:26 13 went on here. You're making the issue was this report  
10:45:29 14 good? Was that report good? Was that report good?

10:45:33 15 MR. PFEIFFER: I'm not trying to do that.

10:45:35 16 THE COURT: You were doing that. So you can ask  
10:45:37 17 the question that I told you.

10:45:45 18 MR. PFEIFFER: Thank you.

10:45:45 19 (End of sidebar discussion.)

10:45:55 20 Q In the course of your sensitivity analysis, did you  
10:45:58 21 look at the number that Mr. Kaplan -- sorry -- Mr. Tucker  
10:46:01 22 used that he entitled "Cost of Sales"? Do you recall  
10:46:04 23 that?

10:46:05 24 A Yes.

10:46:05 25 Q Okay. And if you'd --

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10:46:12 1 MR. PFEIFFER: I guess, Gail, if you have

10:46:14 2 Schedule 12D(s) again.

10:46:22 3 Q I believe -- so this is -- if I've got the right one,  
10:46:25 4 this is from the supplemental August report, correct?

10:46:29 5 A Yes.

10:46:29 6 Q So you'll see Mr. -- oh, sorry. That's your 12D(s).

10:46:37 7 MR. PFEIFFER: Actually, let's take that down.

10:46:38 8 A No. That's Mr. Tucker's.

10:46:38 9 Q This is Mr. Tucker's sheet?

10:46:41 10 A Yes.

10:46:41 11 Q Oh, okay. So Mr. Tucker here, in his sheet with what  
10:46:44 12 he finally reported, he used a cost of sales figure of  
10:46:49 13 79 percent as his average, correct?

10:46:53 14 A Yes.

10:46:54 15 Q And that's what he testified about here in court,  
10:46:56 16 that he used that figure?

10:46:58 17 A Yes.

10:46:58 18 Q Okay. And if he had used a sensitivity -- a cost of  
10:47:04 19 sales figure of 77.9 percent, how much difference would  
10:47:08 20 that make to his calculation of damages?

10:47:13 21 A If he had used the 2015 number, it would raise his  
10:47:17 22 damage estimate by about \$7 million.

10:47:21 23 MR. PFEIFFER: Gail, could you put up Kaplan  
10:47:24 24 slide 8, please. No. That's Tucker slide 8, I believe.

10:47:47 25 Q This is a slide that you have prepared that shows the

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1 effect on the amount of damages that Mr. Tucker's

2 methodology produces depending on how you change the cost

3 of sales that he uses?

4 A It -- yes.

5 Q Okay. Would you explain how that works?

6 A Yes. So Mr. Tucker -- if you use the 2015 data

7 alone.

8 Q Let's just use the numbers. If you use a

9 77.2 percent figure, what amount of damages does his model  
10 produce?

11 A 53.5 million for the period all the way through 2029.

12 Q Okay. And for that same time period through 2029, if  
13 you make the relatively small adjustment in the cost of  
14 sales to 79 percent, what happens to the amount of  
15 damages?

16 A They decline substantially to 46.5 million.

17 Q And how about if you move from 79 percent to  
18 79.8 percent? What happens to his damages figures?

19 A They fall another \$6 and a half million.

20 Q Okay. To that 40.1 million that's referred to there?

21 A Yes.

22 Q And are you adopting the position that any of those  
23 is an appropriate measure of damages?

24 A No. These are all -- these are all speculation.

25 Q But what does this change, when you make small

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10:49:03 1 adjustments to the cost of sales, tell you about the  
10:49:06 2 reliability of Mr. Tucker's methodology?

10:49:09 3 A What it means is that small changes in costs cause a  
10:49:16 4 substantial change in the damage number. As a result, it  
10:49:21 5 means that we can't have confidence, economically reliable  
10:49:27 6 numbers to project 12 years in the future. When the  
10:49:30 7 numbers change by such a small amount in terms of the  
10:49:35 8 costs but then the damage estimate changes so  
10:49:39 9 dramatically, it means that we can't have confidence in  
10:49:42 10 the reliability of the numbers.

10:49:44 11 And this is particularly important because the costs  
10:49:47 12 could change in 2018 and they could change in 2019 and  
10:49:53 13 2020 and 2021 before we even begin to make the projection,  
10:49:57 14 which doesn't start until 2021. If those costs change,  
10:50:03 15 these numbers could change again and again and again and  
10:50:06 16 again. We just can't have any confidence that we can  
10:50:09 17 predict the future like Mr. Tucker says.

10:50:13 18 Q So there's the problem of the small changes in cost  
10:50:16 19 of sales causing big changes in damages. And it sounds  
10:50:19 20 like there's also a problem because these damages won't  
10:50:22 21 even start for more than three and a half years from now;  
10:50:25 22 is that right?

10:50:26 23 A Yes. And there are other costs that are changing  
10:50:29 24 here. This is an example of the most important cost. But  
10:50:32 25 absolutely. If we had data from the next three and a half

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10:50:35 1 years, that would educate us meaningfully about what's  
10:50:39 2 actually going to happen to their costs. But the  
10:50:42 3 projection doesn't begin until 2021. And so we're just  
10:50:46 4 ignoring -- as part of this process, we're just ignoring  
10:50:51 5 the real world evidence of what's actually going to happen  
10:50:54 6 to their books and records. But we do know that when  
10:50:57 7 their costs change from year to year, that the profit  
10:51:00 8 changes are dramatic.

10:51:02 9 Q Now, you recall, Mr. Kaplan, when Mr. Tucker was  
10:51:07 10 here, he testified that he used a method called a discount  
10:51:12 11 rate to account for uncertainties in his -- in his  
10:51:16 12 methodology?

10:51:17 13 A Yes.

10:51:17 14 Q And does that solve the problems with the model that  
10:51:21 15 you've identified here this morning?

10:51:25 16 A It does not.

10:51:26 17 Q Why not?

10:51:27 18 A Well, number one is the discount rate doesn't have  
10:51:30 19 anything to do with the possibility that they might be  
10:51:34 20 able to obtain a supply of door skins, which would make  
10:51:37 21 all these calculations irrelevant. If they get door  
10:51:41 22 skins, they wouldn't go out of business.

10:51:42 23 But secondly is that Mr. Tucker used the same  
10:51:45 24 discount rate when he estimated the damages were 53.5 and  
10:51:49 25 said they were conservative but used the same discount

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10:51:52 1 rate again to say that the 46.5 million number was  
10:51:56 2 conservative. In other words, it changed by \$7 million.  
10:51:59 3 And it's -- what that means is the discount rate for the  
10:52:04 4 higher number can't be reliable to adjust for all the  
10:52:07 5 uncertainty because we found another year of data and the  
10:52:11 6 number changes by \$7 million. It's not adjusting properly  
10:52:15 7 for uncertainty. We have a proof positive in his own  
10:52:19 8 analysis.

10:52:20 9 Q So what is your ultimate conclusion about the  
10:52:22 10 reliability of Mr. Tucker's future lost profit  
10:52:27 11 calculation?

10:52:27 12 A It's speculative and unreliable.

10:52:30 13 MR. PFEIFFER: Thank you, Mr. Kaplan.

10:52:47 14 THE COURT: Are you all all right to continue or  
10:52:49 15 do you need a break? Everybody all right now? Okay.

10:53:12 16 Thank you.

10:53:18 17 MR. DANE: May I proceed, Your Honor?

10:53:19 18 THE COURT: I think she's got something she  
10:53:21 19 wants to hand out there.

10:53:23 20 MR. DANE: Sorry. Those are just your reports.

10:53:34 21 THE WITNESS: Thank you, Mr. Dane.

10:53:38 22 THE COURT: I take it you're not going to get  
10:53:39 23 into those either?

10:53:41 24 MR. DANE: No, I don't think so. Hopefully not,  
10:53:43 25 Your Honor.

Kaplan - Cross

THE COURT: Not after what you objected to.

One package of it is your deposition, Dr. Kaplan.

THE WITNESS: I'm sorry, sir?

THE COURT: One of those notebooks is a copy of your deposition.

THE WITNESS: Yes, sir. Thank you.

THE COURT: One is a copy of your reports. The black one is some exhibits, I gather.

THE WITNESS: Yes, sir. Thank you.

THE COURT: Wait a minute. We've got more.

MR. DANE: Okay. I think we're set to go, Your Honor.

**CROSS-EXAMINATION**

BY MR. DANE:

Q Good morning, Mr. Kaplan.

A Good morning, Mr. Dane.

Q Let me start by asking you about your opinions relating to the overcharge issues in the contract. And I noticed that in the slides that Mr. Pfeiffer showed you, you called those contract damages. But you're not expressing an opinion as to whether those damages may also be recoverable as antitrust damages, are you?

A That sounds like a legal issue, sir. I'm not offering any legal opinions.

Q Okay. Now, you understand that Mr. Tucker did a

Kaplan - Cross

10:54:58 1 detailed analysis of Jeld-Wen's costs for the key inputs  
10:55:02 2 in the supply agreement?

10:55:04 3 A Yes, sir.

10:55:05 4 Q And you're not offering any opinion that Mr. Tucker  
10:55:08 5 incorrectly calculated the key input cost differences for  
10:55:12 6 the various years under that agreement, are you?

10:55:14 7 A I did not check his arithmetic. I don't know whether  
10:55:17 8 they are accurate or not.

10:55:19 9 Q Okay. And you actually -- in your analysis, you used  
10:55:23 10 the calculations that Mr. Tucker had performed of what the  
10:55:27 11 proper input cost data was and then applied different  
10:55:30 12 presumptions that have been given to you by Jeld-Wen's  
10:55:33 13 counsel; isn't that right?

10:55:34 14 A Yes, sir.

10:55:35 15 Q Okay. And -- so you're not disputing the figures  
10:55:40 16 that Mr. Tucker testified to with regard to, for example,  
10:55:45 17 the amounts that Steves actually paid for door skins to  
10:55:48 18 Jeld-Wen for the relevant years, or from 2013 through  
10:55:52 19 May 2017?

10:55:53 20 A The actual prices they paid?

10:55:55 21 Q Correct.

10:55:56 22 A I am not.

10:55:58 23 MR. DANE: If we could pull up, Phil, Schedule  
10:56:00 24 1F2S.

10:56:04 25 Q And this should be in your binder, Mr. Kaplan. I



Kaplan - Cross

10:56:07 1 think it's towards -- I think it might be the last one.

10:56:10 2 And so we see here, these are just figures.

10:56:15 3 MR. DANE: They are, Your Honor, from  
10:56:17 4 Mr. Tucker's report, but I am just interested in the  
10:56:20 5 numbers.

10:56:20 6 Q So, for example, from 2015, when Mr. Tucker  
10:56:23 7 calculated that the total quantity of door skins that  
10:56:26 8 Steves had purchased from Jeld-Wen was 7,372,275 units,  
10:56:33 9 you don't disagree with that, right, sir?

10:56:35 10 A I have not specifically checked that arithmetic.

10:56:38 11 Q But you have no reason to believe that's incorrect,  
10:56:40 12 correct?

10:56:41 13 A I have no reason to believe one way or the other.

10:56:43 14 Q You assumed -- you told me that you took, as a basis  
10:56:47 15 for your own calculations, the calculations that  
10:56:49 16 Mr. Tucker had done, which included these amounts of  
10:56:52 17 quantity, correct?

10:56:53 18 A I did some sensitively tests on -- to reflect  
10:56:55 19 different assumptions, that's correct.

10:56:57 20 Q Okay. And you have no reason to dispute the average  
10:56:59 21 door skin cost reflected here in 2015 of \$.49, do you,  
10:57:03 22 sir?

10:57:04 23 A Again, I haven't specifically checked the arithmetic,  
10:57:08 24 sir. I'm sorry.

10:57:13 25 Q And you were here during Mr. Tucker's direct

Kaplan - Cross

10:57:15 1 examination?

10:57:16 2 A Yes, sir.

10:57:18 3 MR. DANE: Okay. Let me put up -- if we could  
10:57:22 4 put up, Phil, slide 10, which was used during Mr. Tucker's  
10:57:26 5 examination.

10:57:29 6 Q And I think -- I think Mr. Pfeiffer may have shown  
10:57:31 7 you this as well in your direct examination.

10:57:36 8 MR. DANE: And, Your Honor, we had been asked to  
10:57:38 9 mark the demonstratives just for the record that  
10:57:40 10 Mr. Tucker used. So we will mark this as PTX 903 and  
10:57:45 11 provide it the Court subsequently.

10:57:47 12 THE COURT: I thought last night you said you  
10:57:48 13 weren't going to have demonstratives as exhibits.

10:57:52 14 MS. MALTAS: That's exactly right, Your Honor.  
10:57:54 15 The parties agreed that demonstratives are not exhibits.

10:57:58 16 MR. DANE: I wasn't suggesting it was an  
10:57:58 17 exhibit, Your Honor. I thought Your Honor wanted it  
10:58:01 18 marked just for purposes of the record, not to go to the  
10:58:02 19 jury. But if that's not necessary, that's fine.

10:58:05 20 THE COURT: All right.

10:58:08 21 Q So, again, looking at these figures, Mr. Kaplan, just  
10:58:12 22 to be clear, you're not disputing the accuracy of  
10:58:14 23 Mr. Tucker's calculation that the overcharge with regard  
10:58:19 24 to door skins other than the Madison and Monroe door skins  
10:58:24 25 for the 2013 through 2017 time period would be

Kaplan - Cross

10:58:27 1 \$8,630,567 -- excuse me -- \$8,630,567 if the jury

10:58:39 2 concludes that under the contract, prices could go down as

10:58:43 3 well as up?

10:58:45 4 A I apologize, Mr. Dane, but I have not checked the

10:58:48 5 arithmetic. I wasn't asked to do that as part of my work

10:58:51 6 in that matter. So I can't tell you whether the numbers

10:58:54 7 are right or wrong.

10:58:59 8 MR. PFEIFFER: Your Honor, in the interest of

10:59:00 9 expediting, I think that's been established now pretty

10:59:02 10 readily. I don't think we need to do that as to every

10:59:05 11 figure in the case.

10:59:07 12 Q And your answer -- we can short-circuit this. Your

10:59:10 13 answer would be the same with regard to the \$1,303,035

10:59:15 14 figure for Madison and Monroe? You are not here in court

10:59:18 15 telling the jury that Mr. Tucker's calculation of that is

10:59:21 16 incorrect, are you, sir?

10:59:23 17 A I am not. I don't know one way or the other.

10:59:26 18 Q Because you didn't look at that, did you?

10:59:28 19 A I wasn't asked to look at that. No, sir.

10:59:30 20 Q And you didn't look at it?

10:59:31 21 A I did not.

10:59:38 22 Q And were you here in court when Mr. Mallard

10:59:42 23 testified?

10:59:43 24 A I was not here, but I've read Mr. Mallard's

10:59:46 25 testimony.

Kaplan - Cross

Q And did you hear him testify to Jeld-Wen's position that if its key input costs went up by 2 percent in 2018, that Jeld-Wen could take a 1 percent price increase from the prices it charged in 2017?

MR. PFEIFFER: Your Honor, I believe this is actually the issue that Mr. Dane raised during direct examination and that we are not supposed to go into.

MR. DANE: I'll withdraw the question, Your Honor.

Q Okay. You testified a little bit, Mr. Kaplan, about Mr. Tucker having included Towanda in his overcharge calculations. Do you recall that?

A Yes, sir.

Q Okay. And in your first -- I do have to -- okay.

THE COURT: Ask him the question, and we're not grading his reports.

Q Now, you had the ability, didn't you, Mr. Kaplan, to perform an alternative calculation based upon the final figures in Mr. Tucker's final analysis of damages in which you could have backed out the effect of Towanda on the overcharge issue; isn't that right?

MR. PFEIFFER: Your Honor, I believe that's incorrect, given the scheduling of the expert reports. There was no opportunity to do so.

THE COURT: Mr. Dane, I don't think he said to

Kaplan - Cross

11:01:24 1 submit a report. He said you could have before you --  
11:01:27 2 basically anytime up to the time it was done, presumably  
11:01:31 3 until he testified today, I guess. I don't know. There  
11:01:33 4 wasn't any time limit put on it, and it wasn't linked to a  
11:01:36 5 report. So does your question have to do with --

11:01:41 6 MR. DANE: Yes. That's the question, Your  
11:01:42 7 Honor. I'm trying to be sensitive to the Court not  
11:01:43 8 wanting us to get bogged up in the reports. He had  
11:01:44 9 done --

11:01:47 10 Q You had done that calculation in an earlier report,  
11:01:51 11 correct, sir?

11:01:52 12 A I did do a calculation that showed if you removed  
11:01:55 13 Towanda from Mr. Tucker's calculations, that Steves would  
11:01:58 14 actually owe Jeld-Wen money. There are no overcharges.

11:02:01 15 Q That's actually not -- that's not the question that I  
11:02:02 16 asked, sir. So if you'd please just answer my question.

11:02:05 17 A I apologize.

11:02:07 18 Q And it's also not an accurate answer to my question,  
11:02:07 19 sir.

11:02:08 20 THE COURT: I'm going to strike the answer  
11:02:09 21 because it wasn't responsive to the question. Please get  
11:02:13 22 the question up again.

11:02:15 23 MR. DANE: Yes, sir.

11:02:16 24 Q Now, in fact, when you said that Steves would have  
11:02:19 25 owed Jeld-Wen money, Mr. Kaplan --

Kaplan - Cross

11:02:21 1 THE COURT: I just struck that.

11:02:23 2 MR. DANE: Okay. I'll move on.

11:02:24 3 THE COURT: Do you want it back in?

11:02:28 4 MR. DANE: I --

11:02:29 5 THE COURT: I struck it because it wasn't  
11:02:31 6 responsive to the question, and I struck it in response to  
11:02:33 7 your objection. So I sustained your objection. Now, what  
11:02:37 8 are we going to do here?

11:02:39 9 MR. DANE: I'll move on.

11:02:47 10 Q The calculation that you actually did in your report,  
11:02:51 11 Mr. Kaplan, was not only backing out Towanda, but also  
11:02:56 12 assuming that Steves was not entitled to any negative  
11:02:59 13 price reductions when costs went down; isn't that right?

11:03:02 14 A Yes, sir.

11:03:02 15 Q Okay. And that's -- that calculation is one that you  
11:03:09 16 did not do with regard to Mr. Tucker's final damages  
11:03:13 17 calculations; isn't that right?

11:03:16 18 A I didn't understand that I was allowed to. I didn't  
11:03:19 19 get his numbers -- his numbers came at the same time as my  
11:03:23 20 last report.

11:03:25 21 MR. DANE: Your Honor, could I ask that the  
11:03:27 22 witness be instructed to answer the questions? I just  
11:03:29 23 asked him if he did it or not.

11:03:31 24 MR. PFEIFFER: Your Honor, I think that was  
11:03:33 25 responsive because of the time constraints.

Kaplan - Cross

11:03:35 1 THE COURT: No. He took a cue from you.

11:03:37 2 BY MR. DANE:

11:03:37 3 Q You didn't do it, sir, did you?

11:03:40 4 A No, sir.

11:03:40 5 THE COURT: At any time?

11:03:41 6 THE WITNESS: No, sir.

11:03:42 7 THE COURT: All right. That's the question.

11:03:44 8 THE WITNESS: Yes, sir.

11:03:45 9 THE COURT: Not whether you did it in a  
11:03:46 10 responsive report that was allowed or not allowed. It's  
11:03:50 11 whether from then till now he's done it, and the answer is  
11:03:54 12 no. So let's go.

11:03:56 13 Q And that's a calculation that you could have done,  
11:03:57 14 sir, based on the information available to you, correct?

11:04:00 15 THE WITNESS: I apologize, Your Honor.

11:04:02 16 A I didn't know I was allowed to, given the schedule.  
11:04:04 17 I'm sorry.

11:04:05 18 Q Let me clarify my question, Mr. Kaplan. I'm not  
11:04:08 19 asking about issues of whether you'd be allowed to or not.  
11:04:11 20 As a matter of the arithmetic, you could have performed  
11:04:13 21 that calculation based on the information available to  
11:04:19 22 you, correct?

11:04:20 23 A Yes, sir.

11:04:21 24 Q Okay. And even without having performed that  
11:04:33 25 calculation, sir, you understand, don't you, that if you

Kaplan - Cross

11:04:37 1 assume that the prices could go down as well as up, even  
11:04:41 2 if you took Towanda out of that calculation, there still  
11:04:45 3 would have been overcharges to Steves over the 2013  
11:04:50 4 through 2017 period?

11:04:51 5 A I haven't done the calculation.

11:04:53 6 Q So you're not able to --

11:04:55 7 THE COURT: I think he's made that clear. I  
11:04:57 8 don't know how much clearer he can make it --

11:04:59 9 MR. DANE: All right, Your Honor.

11:05:00 10 THE COURT: -- he hasn't done these  
11:05:00 11 calculations. I think he said he wasn't called upon to do  
11:05:07 12 so.

11:05:07 13 MR. DANE: Okay.

11:05:09 14 Q So let me move on, Mr. Kaplan, to the defect claims.

11:05:18 15 And with regard to those claims, do you understand that  
11:05:22 16 Mr. Tucker reviewed data in a database called Vendor Debit  
11:05:28 17 Memo database at Steves?

11:05:31 18 A Yes, sir.

11:05:31 19 Q Okay. You did not review the information in that  
11:05:33 20 database, correct?

11:05:34 21 A At some point I looked at it, but I didn't review it  
11:05:37 22 carefully.

11:05:37 23 Q Okay. And I believe you testified in response to  
11:05:42 24 Mr. Pfeiffer's examination that you understand that  
11:05:46 25 Jeld-Wen disputes whether some of the defect claims are



Kaplan - Cross

11:05:50 1 justified; is that right?

11:05:51 2 A Yes.

11:05:52 3 Q And one of the examples you used is you referred to  
11:05:57 4 trial testimony that, in some instances, Steves might only  
11:06:01 5 test four door skins out of a large pallet and then claim  
11:06:06 6 the rest of the pallet as defective. Do you recall that?

11:06:10 7 A Yes.

11:06:10 8 Q And do you have an understanding of the particular  
11:06:12 9 type of defect that is involved when that happens?

11:06:17 10 A I -- not specifically. No, sir.

11:06:19 11 Q You have no idea, do you, sir?

11:06:21 12 THE COURT: I think he just said he didn't.

11:06:29 13 Q Do you have any understanding of the reason that, in  
11:06:32 14 those instances, Steves only tests four door skins out of  
11:06:38 15 an entire pallet?

11:06:40 16 A I think Mr. Gartner testified about it, but I  
11:06:42 17 didn't -- I can't recall it right now.

11:06:45 18 Q And you have no opinion of your own as to whether or  
11:06:51 19 not it would be appropriate, depending upon the particular  
11:06:54 20 type of defect, to determine that an entire pallet of door  
11:06:59 21 skins was defective based on testing the top door skins;  
11:07:04 22 is that right?

11:07:05 23 A No. I am concerned about the reliability of an  
11:07:08 24 estimate when the door skins aren't actually being tested.

11:07:13 25 Q But I believe, as you said, sir, you don't even know

Kaplan - Cross

11:07:16 1 the type of defect that's involved when that type of  
11:07:18 2 inspection is done; is that correct?

11:07:20 3 A Again, I think Mr. Gartner testified about it. I  
11:07:22 4 don't recall it as I sit here.

11:07:24 5 Q Okay. Now, you also testified in Mr. Pfeiffer's  
11:07:32 6 examination with regard to certain doors for which Steves  
11:07:36 7 submitted claims not having been inspected by Jeld-Wen.  
11:07:40 8 Do you recall that?

11:07:41 9 A I think not having been submitted for inspection.  
11:07:42 10 Yes, sir.

11:07:44 11 Q And do you understand, based on the testimony that  
11:07:47 12 you've heard in this case, that there was a change in  
11:07:52 13 Jeld-Wen policy with regard to whether Jeld-Wen was  
11:07:54 14 willing to reimburse the price of doors to its customers  
11:07:59 15 where they had sold a door skin -- a defective door skin  
11:08:04 16 that was placed in a door around the 2014 period?

11:08:08 17 THE COURT: Don't answer the question. There's  
11:08:09 18 going to be an objection.

11:08:12 19 MR. PFEIFFER: This is exactly what Mr. Dane  
11:08:14 20 objected to and that we were not to do during the  
11:08:17 21 examination was get into the evidence and what it showed.  
11:08:20 22 This asks for exactly the same testimony.

11:08:24 23 MR. DANE: But, Your Honor, he did get into it.  
11:08:26 24 You asked me at the time why I did not object. I planned  
11:08:29 25 to cross him on it, which is the reason that I did not

Kaplan - Cross

object.

THE COURT: It came in without objection.

So overruled.

Q Okay. Let me repeat the question, Mr. Kaplan. Do you understand that in 2014, Jeld-Wen adopted a change in policy as to whether or not it was willing to reimburse its customers for the sales price of defective doors containing defective Jeld-Wen door skins?

A I can't comment --

MR. PFEIFFER: Sorry.

A Can I answer?

THE COURT: You can't comment. Is that what you said?

A I can't comment on a policy issue. But I did see evidence that prior to 2014, on occasion, that Jeld-Wen would reimburse Steves the value of a door.

Q Okay.

A But I don't know anything about change in policy.

Q Okay. Fair enough. Did you hear testimony in court -- you were here when Mr. Gartner testified, correct?

A No, I was not. I read Mr. Gartner's testimony.

Q Okay. And were you here when Mr. Sam Steves testified?

A For part of his testimony. Yes, sir.

Kaplan - Cross

Q Do you understand from their testimony that around the time of the REEB claim, that Jeld-Wen informed Steves that going forward, it would no longer reimburse Steves for the sales price of doors containing defective Jeld-Wen door skins?

A I don't know the particulars of the timing. But I do know that at some point in time, Jeld-Wen informed Steves that it would not reimburse Steves for the value of the entire door.

Q Okay. And you read or heard Mr. Gartner's testimony, didn't you, sir, that when Jeld-Wen adopted this policy, it was no longer economical for Steves to have the customer ship the doors back to its plant so that it could then make it available to Jeld-Wen if all that Jeld-Wen was going to reimburse it for was the cost of the door skin?

A Again, I can't comment on the word policy. But I do remember testimony by Sam Steves concerning that issue.

Q Okay. I didn't use the word policy in my question, sir, but I think you answered my question.

A Okay.

Q And with regard to the various issues that you testified to concerning questions about the defect claims, you didn't individually evaluate the merits of Jeld-Wen's position with regard to whether some of the claims that

Kaplan - Cross

1 Steves submitted were not justified, did you?

2 A I'm not offering an opinion about the legal  
3 interpretation of the supply agreement.

4 Q And you did not attempt to quantify the effect that  
5 any of these issues may have had on Mr. Tucker's defect  
6 damages, did you?

7 A I disagree with that.

8 Q Well, you did not offer any alternative defect damage  
9 calculation of your own, did you, sir?

10 A Well, I -- I just have to push back a little bit. I  
11 said, for example, that if Jeld-Wen's interpretation of  
12 the supply agreement is correct and it's not required to  
13 reimburse for the entire value of the door, then that  
14 whole category of damages, the \$1.77 million, would be  
15 moot. It would be zero.

16 THE COURT: That wasn't the question, though.  
17 The question was whether you did any alternate damage  
18 calculations yourself? In other words, to say instead  
19 of -- just take a number. Claim of \$3 million. I think  
20 it's not 3 million. I think it's 1.2 million. You didn't  
21 do that?

22 THE WITNESS: Not with respect to the defective  
23 doors in general. But -- but I do have an opinion that  
24 relates to Jeld-Wen's interpretation of the agreement that  
25 would make the alternative number, Your Honor, zero.

Kaplan - Cross

Q And there you're referring --

THE COURT: But you can't give the interpretation of the agreement so that's irrelevant. Strike that.

But the -- nevermind. Go ahead.

Q And there was a slide -- I don't think we need to put it up here. But you -- you had, as one of your slides, I believe, Mr. Kaplan, that Steves' claims with regard to the defective doors was based on the value of the door? Do you recall testifying to that?

A Yes.

Q What do you mean by the value of the door?

A The cost to Steves when they had to replace a defective door.

Q Okay. That's what I just wanted to clarify. You understand that the claim that Mr. Tucker was submitting with regard to these doors, he subtracted out of Steves' profit from the sale of the customer, correct?

A Yes. Yes, sir.

Q So he was only looking for, essentially, the cost that Steves incurred in making a defective door that it ultimately had to dispose of, right?

A Yes, sir.

Q Okay. Let's turn to the lost profits opinion that Mr. Tucker gave and your testimony about that. Now, once

Kaplan - Cross

11:14:03 1 again, Mr. Kaplan, with regard to this category of  
11:14:07 2 damages, you did not do your own analysis and come up with  
11:14:11 3 an alternative number for lost profits, correct?

11:14:14 4 A I disagree.

11:14:23 5 Q Did you present a lost profits estimate in your --

11:14:26 6 THE COURT: You're talking about here in court?  
11:14:27 7 You're talking about did he testify to a lost profits  
11:14:32 8 analysis here?

11:14:34 9 MR. DANE: Yes.

11:14:35 10 THE COURT: Did you give an opinion as to what  
11:14:37 11 the lost profits should be?

11:14:39 12 THE WITNESS: It's speculative, Your Honor.  
11:14:41 13 It's zero.

11:14:44 14 Q So your only -- the only number that you're putting  
11:14:47 15 forward for the jury with regard to lost profits is zero?

11:14:50 16 A It's a speculative estimate.

11:14:52 17 Q Okay. Well, let me ask you about some of the aspects  
11:14:56 18 of Mr. Tucker's opinion that you have described as being  
11:14:59 19 speculative. You mentioned housing starts. And  
11:15:02 20 Mr. Tucker, in his analysis, he assumed that housing  
11:15:06 21 starts would increase at 5 percent per year in the years  
11:15:13 22 going forward until they reached 1.5 million in 2022, and  
11:15:17 23 then he assumed they would remain flat thereafter; is that  
11:15:20 24 right?

11:15:21 25 A Yes, sir.

Kaplan - Cross

Q Okay. And you haven't offered your own opinion of what you think a reasonable estimate would be of housing starts from 2021 through 2029, have you?

A I -- based on the history that we actually just looked at, I don't believe you can generate a reliable estimate of housing starts for 12 years into the future. There's just too much volatility in the actual data.

Q Your view is that nobody could possibly make any reasonable estimate of housing starts for that period; is that right?

A Not for purposes of estimating damages, no, sir.

Q Okay. And you noted, when Mr. Pfeiffer examined you, that the projections that Mr. Tucker made of 5 percent growth through 2022 would be very inaccurate if we looked at the historical data beginning in 2007, right?

A Yes.

Q And 2007 was a special year in the housing market, wasn't it, sir?

A One of many.

Q It was the beginning of the greatest housing recession in the United States history, wasn't it?

A It was the Great Recession. I haven't looked at what happened in the Great Depression and compared the two.

But it was a significant event. I agree with you.

Q Okay. And in your analysis that you did for purposes



Kaplan - Cross

1 of this case, you also had occasion to look at estimates  
2 of housing starts that were made by Fannie Mae; isn't that  
3 right?

4 A Yes.

5 Q And Fannie Mae is a governmental mortgage loan  
6 entity?

7 A Yes, sir.

8 Q And you also looked at estimates by the National  
9 Association of Home Builders; is that right?

10 A Yes. Estimates that they were only for one or two  
11 years. Not 12 years.

12 Q Okay. And do you recall that you looked at the  
13 estimates made in 2015 from both of those entities as to  
14 what 2016 housing starts would look like?

15 A Very generally, Mr. Dane.

16 Q And do you recall that the projections that both of  
17 those entities made were on the orders of 25 to 30 percent  
18 of growth for that year?

19 A What I remember is that in 2015, that those two  
20 government agencies, when they tried to predict just 1  
21 year into the future, not 12, they were wrong.

22 Q That wasn't quite my question, sir.

23 A I apologize.

24 Q Do you recall that what both of these entities were  
25 projecting for 2016 housing starts was growth from 2015 on

Kaplan - Cross

11:17:53 1 the order of 20 to 27, or so, percent?

11:18:00 2 A I don't remember.

11:18:08 3 Q Why don't we take a look at your deposition. And if  
11:18:10 4 I could ask you to look at page 190.

11:18:24 5 A Yes, sir.

11:18:24 6 Q And if you could just read to yourself the question  
11:18:27 7 and answer that begins on page 190, line 4 through line  
11:18:31 8 14?

11:18:48 9 A Yes.

11:18:49 10 Q And do you see here that the projections -- you  
11:18:53 11 understand -- does this refresh your recollection that the  
11:18:56 12 projections that the National Association of Home Builders  
11:18:59 13 was making was from 1,054,000 housing starts in 2015 to  
11:19:05 14 1.342 million housing starts in 2016?

11:19:10 15 A I see the numbers. Yes, sir.

11:19:12 16 Q And that's an increase of approximately 27 percent?

11:19:19 17 A Around there.

11:19:20 18 Q Okay. And if you can look in your binder at the  
11:19:29 19 document that's labeled "Fannie Mae."

11:19:32 20 A The black one?

11:19:34 21 Q Yes.

11:19:46 22 A There's nothing in it. Behind "Fannie Mae," it's  
11:19:50 23 blank.

11:19:50 24 Q I can probably lend you mine, Mr. Kaplan.

11:19:53 25 THE COURT: We've got one.

Kaplan - Cross

MR. DANE: Thanks.

THE COURT: I've got one.

MR. DANE: Phil, why don't we also pull that up.

Q Okay. And do you recognize this to be the projections from Fannie Mae that you had reviewed for purposes of your work in this case?

A Generally. Yes, sir.

Q Okay. And if you look over in the right-hand column underneath single -- under the third item under 2016, do you see there that there was a projection of housing starts of 20.4 percent?

A Yes. I think that Fannie Mae is trying to estimate housing starts in 2016 in January of 2015.

Q Okay. And both of -- and both of these projections from Fannie Mae and from NAHB were projections of significantly higher growth than Mr. Tucker's 5 percent; isn't that right?

A Particularly -- they were both higher and both wrong. They got it wrong.

Q But the actual growths in those years were still higher than Mr. Tucker's 5 percent projection, correct?

A I'd have to look at the actual data.

Q Let's go back to your deposition. And if you look at page 189, and this will just be about the National Association of Home Builders projection, Mr. Kaplan.

Kaplan - Cross

11:22:08 1 A Yes, sir.

11:22:08 2 Q So if you first look at page 190, you see there that  
11:22:11 3 the figure that was the 2015 actual housing starts was  
11:22:17 4 1,054,000. This is on line 6.

11:22:20 5 A I see that. Yes, sir.

11:22:22 6 Q And then if we look back at page 189 in line 17, do  
11:22:33 7 you see there that the actual housing starts were  
11:22:36 8 1,173,800 for -- for 2016?

11:22:46 9 A I'm sorry, Mr. Dane. I'm -- I'm not following you.  
11:22:49 10 I apologize.

11:22:51 11 Q Sure. If you could --

11:22:54 12 THE COURT: Well, actual starts is 1,173,800.

11:22:59 13 MR. DANE: Yes.

11:23:00 14 Q All I'm trying to establish, Mr. Kaplan, is we  
11:23:02 15 have -- and as I asked you in your deposition, 2015 was  
11:23:04 16 1,054,000 starts, and then as reflected on page 189, line  
11:23:09 17 17, that went to 1,173,800 starts for 2016 in actuality;  
11:23:17 18 isn't that right?

11:23:19 19 A My memory is that housing starts went up between 2015  
11:23:22 20 and 2016.

11:23:23 21 THE COURT: But is that the amount?

11:23:26 22 THE WITNESS: I'm sorry, Your Honor. I'd  
11:23:28 23 actually have to look at the actual records.

11:23:30 24 A Mr. Dane, if you tell me that's what it is, I'll  
11:23:32 25 accept it. I'm not quarreling that it went up between

Kaplan - Cross

2015 and 2016.

Q And you'll see -- if you look at that testimony, Mr. Kaplan, you see that you agreed with me that that was what the data showed. I'm looking at page 189, lines 15 through 19. I don't think there's any dispute about the numbers.

A Okay.

Q Okay. And that increase from 1,054,000 housing starts in 2015 to 1,173,800 housing starts in 2016, that's significantly higher than a 5 percent increase; isn't that right?

A It's higher than 5 percent. Yes, sir.

Q Okay. Let's turn to your testimony about future sales. And as you testified on direct, you understood Mr. Tucker to have based his volume sales on projected increases in housing starts; is that right?

A Yes.

Q Okay. Did you understand that he started by using the data for Steves' actual sales in 2016 and then he built off of that based upon the housing starts projections?

A Yes, sir.

Q Now, again, you haven't offered your own opinion of what would be a reasonable estimate of Steves' volume sales for these years, have you?

Kaplan - Cross

11:25:01 1 A I disagree. It's speculative. We can't predict that  
11:25:04 2 far in the future with any confidence. I'm sorry.

11:25:07 3 THE COURT: No. The question is have you  
11:25:09 4 offered your own estimate? The answer is no because you  
11:25:11 5 think it's speculative?

11:25:13 6 THE WITNESS: Yes, sir.

11:25:19 7 Q And with regard to costs, you understand that  
11:25:21 8 Mr. Tucker projected future costs after 2021 based on the  
11:25:27 9 assumption that Steves' costs would remain the same  
11:25:31 10 percentage of their sales price as they were in Steves'  
11:25:35 11 last two reported income periods; is that right?

11:25:37 12 A Yes. I understand Mr. Tucker assumed that for 12  
11:25:40 13 years, that Steves would earn the same dollar amount on  
11:25:43 14 every sale with no change whatsoever.

11:25:45 15 Q And, once again, you have not offered your own  
11:25:50 16 opinion of what you think would have -- would be a  
11:25:53 17 reasonable estimate of Steves' costs for 2021 through  
11:25:56 18 2029?

11:25:57 19 A I absolutely have. They are speculative.

11:26:00 20 MR. DANE: Move to strike, Your Honor. The  
11:26:03 21 witness continues to avoid answering the question.

11:26:05 22 THE COURT: The answer is no, you haven't made a  
11:26:07 23 calculation for what you think each year would be, right?  
11:26:10 24 The reason you haven't done it is because it's  
11:26:14 25 speculative, in your view?

Kaplan - Cross

11:26:15 1 THE WITNESS: Yes, sir, Your Honor.

11:26:16 2 THE COURT: That's the way to answer that  
11:26:19 3 question.

11:26:20 4 THE WITNESS: Thank you, sir. Can I adopt it,  
11:26:22 5 Your Honor?

11:26:23 6 THE COURT: Just no would be sufficient. I  
11:26:25 7 think that everybody has got the drift that you think all  
11:26:29 8 of this is speculative. If they haven't, they have been  
11:26:33 9 asleep. And these people over here haven't been asleep.  
11:26:37 10 They are the ones that matter.

11:26:42 11 Q And in determining --

11:26:44 12 THE COURT: Okay, Mr. Dane.

11:26:46 13 MR. DANE: Thank you, Your Honor.

11:26:47 14 THE COURT: All right. And we are now going to  
11:26:48 15 try to get from zero to 60 in how fast?

11:26:53 16 MR. DANE: I don't have too much left, Your  
11:26:54 17 Honor.

11:26:55 18 THE COURT: Good.

11:26:56 19 MR. DANE: Okay.

11:26:56 20 Q In determining the baseline for costs, did you  
11:26:59 21 understand, sir, that Mr. Tucker had assumed that in the  
11:27:03 22 scenario where Jeld-Wen did not acquire CMI, Steves would  
11:27:09 23 not have incurred the damages that he claims under the  
11:27:11 24 supply agreement?

11:27:14 25 A Yes. He adjusted costs for alleged overcharges and

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defective door skins.

Q Okay. And so he took out -- he deducted the overcharges under the supply agreement that he had calculated and the amounts that he had calculated as damages for the defective doors and the defective door skins, correct?

A Yes. Not getting into whether they are reliable or not, he did deduct them.

Q And did you also understand that Mr. Tucker assumed, for purposes of his lost profit analysis, that Steves would not have incurred the legal expenses associated with this lawsuit?

A Yes, sir.

Q Okay. And you understood that to be a substantial amount of money?

A A nontrivial amount of money. Yes, sir.

Q And you understand that Mr. Tucker used a same profit margin that was the same profit margin that Steves had obtained for 2015 and the 14-month period ending February 2017?

A He averaged -- in his last report, he averaged 2015 and the 14-month period. Yes, sir.

Q Okay. And, again, you have not put forward your own estimate of what you think would be a reasonable estimate of profit margin for 2021 through 2029, correct?



Kaplan - Cross

11:28:46 1 A No, because it's speculative.

11:28:48 2 MR. DANE: Move to strike that, Your Honor.

11:28:49 3 THE COURT: I mean, he's going to say that  
11:28:51 4 anyway. I mean, everybody knows. And everybody knows  
11:28:53 5 what he's offered and what he's not offered. So you can  
11:28:56 6 argue what he's not offered.

11:29:01 7 Q Now, I wanted to ask you a little bit about the  
11:29:05 8 testimony you gave about the sensitivity of Mr. Tucker's  
11:29:07 9 analysis, and that related to modifications to the cost of  
11:29:12 10 sale percentages that he used; is that right?

11:29:14 11 A Not only that. Those sensitivities involve all six  
11:29:19 12 cost categories. But cost of sales is the biggest one.

11:29:21 13 Q Okay. And he increased his estimate of cost of sales  
11:29:24 14 as a percentage of sales based upon newer information,  
11:29:28 15 correct?

11:29:29 16 A The new information for the additional 14 months  
11:29:32 17 caused the costs to go up --

11:29:34 18 Q Okay. And that --

11:29:35 19 A -- and the profits to go down.

11:29:37 20 Q And that had the effect of actually reducing his lost  
11:29:40 21 profits calculation, right?

11:29:41 22 A Yes.

11:29:41 23 Q Okay. And do you understand that among the reasons  
11:29:57 24 for the differences in the cost of sale percentages for  
11:30:01 25 the more recent period was that -- strike that. Let me

Kaplan - Cross

withdraw that.

Now, Mr. Tucker did not adjust his figures for the cost of sale percentages to take into account the March through June 2017 financial information from Steves, did he?

A He did not.

Q Okay. And do you understand that the percentage of cost of sales decreased during that time?

A I do not.

Q Have you looked at that financial information?

A I -- not in any detail. It's just four months.

Q Okay. And if the percentage of cost of sales decreased during that time and Mr. Tucker had used that information, then his profits would have increased, correct?

A I'd have to look at it. I don't know. There's too many moving parts, Mr. Dane.

Q Let me ask you a little bit about discount rate. You understand that Mr. Tucker applied a 15 percent discount rate to his lost profit figures?

A He did.

Q And that means that he discounted his calculated value of lost profits by 15 percent per year for every year out into the future?

A Yes, sir.

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Q And you understood that he -- did you understand from his testimony that he used this rate in part to account for the uncertainties of the variables that he used in his calculations?

A That's what he said he did. That didn't work.

MR. DANE: Let's pull up Schedule 12(s), Phil.

Q And if you could look at that in your binder.

MR. DANE: And it's the last time I'm going to a schedule, Your Honor, but I'm just doing it to -- to give us some comparison.

Q And you reviewed this schedule in forming your opinions; isn't that right?

A Yes, sir.

Q Okay. And so just to understand, the effect of Mr. Tucker applying his discount rate was that where for the period of September 2021 through 2029 he calculated actual lost profit dollars of 133,849,865, when he applied his discount rate, the present value of that amount became only 46,480,581, correct?

A I'd push back on the only. But I agree with the calculations.

Q Okay.

A It sounds like a lot of money to me.

Q And similarly, for the period -- shorter period that he calculated, which was September 10, 2021, through

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11:32:51 1 year-end 2024, the actual profit figures that he  
11:32:54 2 calculated were \$50,605,625, and when he applied the  
11:33:01 3 discount rate, they became the \$24,105,985 figure to which  
11:33:08 4 he calculated here in trial, correct?

11:33:11 5 A Yes, sir.

11:33:15 6 Q And for both of those, that's an average of less than  
11:33:19 7 \$6 million a year in profits to Steves and Sons, correct?

11:33:30 8 A I'm -- I'm sorry. What period of time?

11:33:33 9 THE COURT: For each period, is the average  
11:33:35 10 approximately \$6 million?

11:33:37 11 MR. DANE: Yeah. Let me break it up, Your  
11:33:38 12 Honor.

11:33:38 13 Q For the longer period through 2029, that \$46 million  
11:33:42 14 figure that Mr. Tucker testified to would work out to less  
11:33:47 15 than \$6 million a year over approximately an 8-year  
11:33:52 16 period?

11:33:52 17 A Okay. I'll accept your math, Mr. Dane.

11:33:55 18 Q Okay. And as you've testified, you don't believe  
11:33:58 19 that Mr. Tucker's discount rate reliably accounted for the  
11:34:04 20 uncertainties in analysis?

11:34:06 21 A It absolutely does not.

11:34:10 22 Q And once again, you did not offer your own suggested  
11:34:12 23 discount rate in this case, did you?

11:34:14 24 A I did not because the foundation upon which the  
11:34:16 25 discount rate is used, that -- those lost future profits

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are based on housing starts and sales that are unreliable and cost analysis and profit analysis that's unreliable.

Q You don't think there's any discount rate that could be used that would be reasonable; is that right?

A Based on the facts in this case, trying to go out 12 years.

THE COURT: Yes or no?

A Absolutely not, Your -- absolutely no, Mr. Dane.

Q And so just to be clear, and so it's clear to the jury, your opinion is that if the jury concludes that Steves will have no source of door skin supply in 2021 and will be forced out of business, there is no amount that you think it would be appropriate for the jury to award Steves for that damage; isn't that right, sir?

A For somebody who's been doing this for 30 years, what I would say to the jury is that we simply don't know.

MR. DANE: Your Honor.

THE COURT: No. Yes or no?

A I'm sorry. Ask the question again, Mr. Dane. I apologize.

Q Your opinion is that if the jury concludes that Steves will have no source of door skin supply in 2021 and goes out of business, there is no amount that you think it would be appropriate for the jury to award Steves in lost profits; isn't that correct, sir?

Kaplan - Redirect

11:35:27 1 A It's speculative. Yes, sir.

11:35:29 2 MR. DANE: Thank you. I have no further  
11:35:30 3 questions.

11:35:30 4 THE COURT: Do you have any questions?

11:35:31 5 MR. PFEIFFER: Briefly, Your Honor.

11:35:46 6 THE COURT: If you all need a recess now, we'll  
11:35:46 7 take one, but I'm hoping that --

11:35:47 8 MR. PFEIFFER: This will be very short.

11:35:48 9 THE COURT: How brief?

11:35:50 10 MR. PFEIFFER: Five minutes.

11:35:53 11 THE COURT: Five minutes.

11:35:54 12 **REDIRECT EXAMINATION**

11:35:54 13 BY MR. PFEIFFER:

11:35:55 14 Q You were asked some questions about the Great  
11:35:57 15 Recession. Do you recall that?

11:35:58 16 A I do.

11:35:58 17 Q And about various government organizations, estimates  
11:36:01 18 about future housing starts?

11:36:02 19 A I do.

11:36:02 20 Q And those government estimates, even though they had  
11:36:05 21 the resources of the government behind them, were wrong,  
11:36:08 22 weren't they?

11:36:09 23 A They were not only wrong, but they were only willing  
11:36:11 24 to estimate 1 year, not 12 years. And when they did it,  
11:36:17 25 they got it wrong.

Kaplan - Redirect

11:36:18 1 Q And did any of those government organizations predict  
11:36:21 2 the housing crash 12 years before it happened?

11:36:25 3 A They all missed it.

11:36:27 4 Q Now, recessions are a recurring cyclical feature of  
11:36:28 5 the housing market, aren't they?

11:36:31 6 A Absolutely.

11:36:32 7 Q Even if not, each of them is the Great Recession?

11:36:35 8 A Absolutely.

11:36:36 9 Q Does Mr. Tucker's methodology take account of that  
11:36:39 10 reality?

11:36:40 11 A It absolutely does not.

11:36:41 12 Q Does the fact that housing starts increased by more  
11:36:45 13 than 5 percent in the one single year that Mr. Dane  
11:36:46 14 discussed with you affect in any way your calculation that  
11:36:49 15 it would be speculation for Mr. Tucker to project out  
11:36:52 16 growth and then no declines ever for a 12-year period?

11:36:57 17 A Absolutely not.

11:36:58 18 Q You were asked some questions about cost of sales.

11:37:01 19 Briefly on that, the cost of sales that Mr. Tucker used  
11:37:05 20 included costs related to Towanda, right?

11:37:07 21 A It did.

11:37:08 22 Q So they were based on -- and lower because Jeld-Wen  
11:37:11 23 owned Towanda than if it hadn't?

11:37:13 24 A Yes. Absolutely.

11:37:14 25 Q Now, finally, on the discount rate, to be clear, a

Kaplan - Redirect

11:37:19 1 change -- using the discount rate that Mr. Tucker already  
11:37:23 2 used, a change in the cost of sales from 77.2 to 79 --  
11:37:30 3 79.8 percent produced a \$13 million swing in his  
11:37:34 4 calculations; isn't that right?

11:37:36 5 A Yes. He said that the --

11:37:38 6 THE COURT: Yes. That's enough.

11:37:40 7 A Yes. That's absolutely right.

11:37:41 8 Q What does that tell you about whether his discount  
11:37:44 9 rate solves the sensitively problem that you discussed?

11:37:47 10 A It absolutely does not.

11:37:48 11 MR. PFEIFFER: Thank you, Mr. Kaplan.

11:37:49 12 THE COURT: Can he be excused permanently?

11:37:51 13 MR. PFEIFFER: Yes, Your Honor.

11:37:52 14 THE COURT: Thank you very much for being with  
11:37:53 15 us and giving us your testimony, Dr. Kaplan. You may be  
11:37:56 16 excused.

11:37:57 17 THE WITNESS: Thank you, sir.

11:37:58 18 (Witness stood aside.)

11:37:58 19 THE COURT: We'll take a 20-minute recess. The  
11:38:00 20 jury will go first. Please be seated while the jury is  
11:38:05 21 being excused.

11:38:06 22 (The jury exited the courtroom.)

11:38:09 23 THE COURT: Get your next witness ready after  
11:38:11 24 the recess, please. You got your next witness? Are you  
11:38:17 25 through or what?



11:38:18 1 MR. PFEIFFER: Your Honor, that is our last  
11:38:20 2 witness.

11:38:20 3 THE COURT: All right. Then get your witness  
11:38:22 4 ready after the recess. We'll take 20 minutes.

11:38:25 5 (Recess taken.)

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12:05:01PM 1 THE COURT: Next witness, please. I guess you need  
12:05:04PM 2 technically to do something on the record, don't you?

12:05:07PM 3 MR. PFEIFFER: That's correct, Your Honor. I'll turn  
12:05:11PM 4 over those notes of Mr. Pomerantz's. We are submitting, filing  
12:05:16PM 5 a short proffer. Subject to that, we rest, Your Honor. It  
12:05:21PM 6 will be on file very shortly.

12:05:23PM 7 THE COURT: Proffer of what?

12:05:25PM 8 MR. PFEIFFER: Relating to certain of the testimony  
12:05:27PM 9 of Professor Snyder.

12:05:33PM 10 THE COURT: You had him here. You could have made  
12:05:35PM 11 the proffer while he was here.

12:05:37PM 12 MR. PFEIFFER: We wanted to make sure the record is  
12:05:39PM 13 clear --

12:05:40PM 14 THE COURT: I told you, you do it while he's here.  
12:05:43PM 15 Do you want to put him on, put him on later during a break?  
12:05:47PM 16 That way, they have a chance to cross-examine, and they have a  
12:05:51PM 17 record.

12:05:53PM 18 I told you before, and you said -- Ms. Zwisler, I  
12:05:59PM 19 think, said I had not made it clear when it came in for Bob  
12:06:04PM 20 Merrill. There's one in for that, but I think I told you then  
12:06:10PM 21 the way you did proffers was you did it out of the presence of  
12:06:13PM 22 the jury so we had a complete record. Have a seat.

12:06:17PM 23 MR. PFEIFFER: Thank you, Your Honor.

12:06:22PM 24 MR. POMERANTZ: Your Honor, I wanted to let you know  
12:06:24PM 25 that we filed a little while ago a Rule 50 motion relating to

12:06:27PM 1 the issue that was discussed yesterday, and that's on file now.

12:06:31PM 2 THE COURT: I was told that one was filed.

12:06:34PM 3 MR. POMERANTZ: Thank you, Your Honor. We would  
12:06:36PM 4 recall Professor Shapiro.

12:06:39PM 5 THE COURT: All right, Professor Shapiro.

12:06:43PM 6  
12:06:43PM 7 **CARL SHAPIRO,**  
12:06:43PM 8 a witness, recalled at the instance of the plaintiff, having  
12:06:43PM 9 been previously duly sworn, testified as follows:

12:06:54PM 10  
12:06:55PM 11 THE COURT: Dr. Shapiro, you were not permanently  
12:06:56PM 12 released, so you are under the same oath you took earlier in  
12:07:00PM 13 these proceedings. Thank you, Mr. Robertson.

12:07:08PM 14 MR. POMERANTZ: Your Honor, may I proceed?

12:07:09PM 15 THE COURT: Please.

12:07:09PM 16  
12:07:09PM 17 DIRECT EXAMINATION

12:07:11PM 18 BY MR. POMERANTZ:

12:07:11PM 19 Q Professor Shapiro, Professor Snyder testified yesterday in  
12:07:16PM 20 court. Have you had an opportunity to review his testimony?

12:07:18PM 21 A Yes, I have.

12:07:20PM 22 Q I'd like to ask you a few questions about that testimony.  
12:07:24PM 23 Yesterday, Professor Snyder testified that the output of door  
12:07:30PM 24 skins had increased after the merger; do you recall reading  
12:07:32PM 25 that?

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12:07:33PM 1 A I do.

12:07:34PM 2 Q Did you analyze what happened to the output of door skins

12:07:38PM 3 after the merger?

12:07:38PM 4 A I did.

12:07:39PM 5 Q And what happened to the output of door skins?

12:07:42PM 6 A It did go up. We're talking now from roughly 2012 into

12:07:47PM 7 2016 or '17. It went up. And to be clear, output, we're just

12:07:49PM 8 measuring the number of door skins used in the United States.

12:07:53PM 9 Q So to that extent, you agree with Professor Snyder;

12:07:56PM 10 correct?

12:07:56PM 11 A Yes. We agree it clearly went up, the output.

12:07:59PM 12 Q Now, Professor Snyder also testified that if the merger

12:08:03PM 13 had actually caused anticompetitive effects, the door skin

12:08:08PM 14 output would have decreased; do you recall reading that?

12:08:10PM 15 A I do.

12:08:11PM 16 Q Do you agree with him?

12:08:12PM 17 A I strongly disagree with that.

12:08:15PM 18 Q Why do you disagree?

12:08:16PM 19 A So we're now talking about what happened to the number of

12:08:19PM 20 door skins used in the United States from 2012 to 2017.

12:08:25PM 21 Professor Snyder makes the point that if the price went up by

12:08:29PM 22 the law of demand, we'd expect fewer door skins to be used.

12:08:33PM 23 That is a consideration. But let's remember, as we've all

12:08:38PM 24 heard, from 2012 and the subsequent years, we had a recovery of

12:08:42PM 25 the housing market and, therefore, recovery in the number of

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12:08:46PM 1 homes built and the number of doors used.

12:08:49PM 2       So if you think about going from 2012 to 2017, let's first  
12:08:54PM 3 talk about the price increase of the door skins. That's one  
12:08:57PM 4 factor to consider. So door skins, let's say around \$5 each,  
12:09:03PM 5 so -- and Professor Snyder found about a ten percent,  
12:09:06PM 6 11 percent increase in the price of door skins, so that's about  
12:09:09PM 7 \$0.50 a door skin. You need two door skins to make a door, so  
12:09:13PM 8 that's about a dollar a door.

12:09:14PM 9       So now we can ask ourselves, if you are building a house  
12:09:20PM 10 for \$200,000, say, and somebody tells you, oh, each door costs  
12:09:25PM 11 a dollar extra, we just learned it's going to be a little more  
12:09:29PM 12 expensive -- I don't know, five or ten doors in a house, so  
12:09:32PM 13 it's an extra five or ten bucks. Maybe there's some more  
12:09:36PM 14 markups along way, so as a final consumer, you're paying ten or  
12:09:40PM 15 20 bucks more for your house.

12:09:41PM 16       It's very unlikely that people would decide not to build  
12:09:46PM 17 homes because of the extra ten or 20 bucks. So the increase in  
12:09:50PM 18 the price of the door skin is not going to cause any  
12:09:53PM 19 significant drop in the use of door skins in the United States,  
12:09:58PM 20 because it's a small piece of a home, and that's pretty much  
12:10:01PM 21 true for renovation projects, too. It's not quite as extreme,  
12:10:05PM 22 but it's still a few dollar a door. A dollar a door is not  
12:10:08PM 23 going to have any significant impact.

12:10:10PM 24       So the factor that he asked us to look at, the increase in  
12:10:14PM 25 the price of door skins, we know, is not going to have any

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12:10:17PM 1 material effect on the quantity, on the output for the reasons  
12:10:21PM 2 I've explained.

12:10:22PM 3 Now, at the same time, we know the recovery of the housing  
12:10:27PM 4 market is significant. We went from, what, 800,000 housing  
12:10:30PM 5 starts a year to 1.1 million, something like that. So, of  
12:10:35PM 6 course, the output is going to go up. More doors are put in,  
12:10:39PM 7 more door skins. We agree on that.

12:10:41PM 8 What about the anticompetitive effects of the merger or  
12:10:44PM 9 the effects of the merger? I found the price increases. He  
12:10:48PM 10 did not dispute that. To suggest that there's been no  
12:10:52PM 11 anticompetitive effects, no harm to competition because more  
12:10:57PM 12 homes were built, that doesn't make any sense; okay?

12:11:00PM 13 What I believe happened was there was a reduction in  
12:11:04PM 14 competition, price of door skins went up, people who had to  
12:11:08PM 15 build their homes paid more as a result, but, of course, more  
12:11:13PM 16 door skins were used because of the housing recovery. So I  
12:11:16PM 17 think his analysis here is not correct.

12:11:19PM 18 Q Let me go to another aspect of Professor Snyder's  
12:11:22PM 19 testimony yesterday. He testified that an economist would  
12:11:26PM 20 expect companies to raise price as they come out of a  
12:11:30PM 21 recession; do you recall reading that?

12:11:31PM 22 A I do.

12:11:32PM 23 Q And, by the way, I say reading that, because there's a  
12:11:35PM 24 transcript of what's said in the court each day; you understand  
12:11:38PM 25 that?

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12:11:38PM 1 A I certainly do.

12:11:39PM 2 Q And that's what you read?

12:11:40PM 3 A It is.

12:11:41PM 4 Q And do you recall -- thanks to our court reporter here.

12:11:46PM 5 Do you recall that Professor Snyder described the increase in

12:11:50PM 6 door skin prices as due to a recovery in demand?

12:11:53PM 7 A Absolutely.

12:11:55PM 8 Q Now, did door skin prices fall significantly when the

12:12:00PM 9 housing crash occurred and demand went down?

12:12:04PM 10 A No, they did not.

12:12:06PM 11 Q What happened?

12:12:07PM 12 A So we looked at this in the data, both Professor Snyder

12:12:13PM 13 and I. So if you compare roughly the peak of the housing

12:12:17PM 14 market, 2006 or so, 2007 to 2012, which is the time of the

12:12:22PM 15 merger, we have the best data on prices for door skins paid by

12:12:28PM 16 Steves, and they did go down but only by about one percent.

12:12:32PM 17 You might have thought they'd go down a lot. A lot of

12:12:35PM 18 other prices did go down a lot during that period of time but

12:12:38PM 19 not door skin prices. So I understand Professor Snyder to be

12:12:41PM 20 saying, well, the prices came way down, so, naturally, they

12:12:44PM 21 would bounce back, door skin prices. He didn't quite say that,

12:12:50PM 22 but I took that to be the gist of his argument, and so -- but

12:12:54PM 23 the assumption there or the predicate is not right. The door

12:12:59PM 24 skin prices were basically flat from 2006 or '07 to 2012. They

12:13:03PM 25 fell by one percent.

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1 So it's not like we, you know, pulled the rubber band and  
2 had to bounce back. The prices were flat, and so there's no  
3 necessary reason to think they're going to go up, because they  
4 didn't go down very much at all.

5 Q So the fact that the price of door skins didn't go down  
6 significantly during the housing crash, why is that relevant to  
7 Professor Snyder's opinion that door skin prices would  
8 automatically rise because we're having a housing recovery?

9 A So I take his basic argument to be the prices would  
10 inevitably have gone up, door skin prices, after 2012 because  
11 of the recovery, and I don't think that's right as a matter of  
12 economics, and I think we're going to talk about that more, but  
13 especially if you -- in posing that question, you think, well,  
14 the prices fell a lot, so they're going to go up. They did not  
15 fall a lot. I think that's important to know that fact in  
16 thinking about what happens after 2012, that the prices had not  
17 gone down in any significant way from 2006 to 2012.

18 Q Do you think that coming out of a recession necessarily  
19 causes companies to raise their prices?

20 A No. It's not automatic. This, I spent a fair bit of my  
21 time in my -- when I appeared here before asking whether the  
22 price increases that we did see for door skins from 2012 on  
23 were because of demand going up or not, and you do that  
24 inquiry, you look at the facts of the case, because it's not  
25 automatic. Prices don't necessarily rise when you come out of



12:14:44PM 1 a recession. Sure they do for a lot of things, but it's not  
12:14:47PM 2 automatic. You have to look at the facts of the case.

12:14:50PM 3 Q Let's look at the facts as you saw them. What factors do  
12:14:53PM 4 you think could explain a price increase if it occurs when  
12:14:56PM 5 there's an economic recovery going on?

12:14:58PM 6 A So, the main things we look to are whether the costs of  
12:15:03PM 7 making that product went up. Again, we're talking about door  
12:15:07PM 8 skins, so we'd look at the input costs such as the resin and  
12:15:09PM 9 the wood and so forth. Then we look at whether capacity got  
12:15:12PM 10 tight. So costs and capacity. The two things I talked about  
12:15:16PM 11 at some length when I was here before.

12:15:17PM 12 Q What do those factors tell us about whether prices would  
12:15:21PM 13 increase in the door skin industry following the recovery?

12:15:24PM 14 A So my analysis indicates those -- neither of those factors  
12:15:31PM 15 points to a price increase in the door skin industry market  
12:15:36PM 16 after 2012. So the point is, these price increases are not  
12:15:42PM 17 inevitable when the economy recovers. You need to look at  
12:15:45PM 18 these factors, and in this industry in this case, I looked at  
12:15:48PM 19 the key factors, and they were not indicating -- or do not  
12:15:54PM 20 provide a basis to expect prices to go up.

12:15:57PM 21 Q And so if an increase in costs or a tightening of capacity  
12:16:02PM 22 is not the reason why prices went up, what did you conclude was  
12:16:06PM 23 the reason why prices went up?

12:16:08PM 24 A Well, again, I don't think it's going to be a big surprise  
12:16:11PM 25 here for the jury. So we have the substantial increase in

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12:16:15PM 1 concentration associated with the merger between Jeld-Wen and  
12:16:18PM 2 CraftMaster is the cause, in my view, and, again, that was also  
12:16:24PM 3 tied back to the market concentration analysis, and that was  
12:16:29PM 4 the gist of my analysis that I presented last week.

12:16:34PM 5 Q All right. Let's go to another thing that Professor  
12:16:39PM 6 Snyder testified to yesterday. Do you recall Professor Snyder  
12:16:41PM 7 testifying that you used the wrong pricing model in analyzing  
12:16:45PM 8 the relationship between costs and prices?

12:16:47PM 9 A I do.

12:16:49PM 10 Q All right. So I want to look at your original testimony  
12:16:53PM 11 on this.

12:16:55PM 12 MR. POMERANTZ: Mr. Nichols, can you bring up 902.55.

12:17:08PM 13 Q All right, do you remember this slide from your direct  
12:17:10PM 14 testimony?

12:17:11PM 15 A I do.

12:17:12PM 16 Q Do you recall testifying that after the merger, Jeld-Wen's  
12:17:16PM 17 prices went up while its per-door-skin manufacturing costs went  
12:17:21PM 18 down?

12:17:22PM 19 A Correct.

12:17:22PM 20 Q And that was a reason that you concluded that the price  
12:17:26PM 21 increases after the merger cannot be explained based on cost  
12:17:31PM 22 increases; right?

12:17:32PM 23 A Exactly.

12:17:33PM 24 Q Professor Snyder testified that you used a model for  
12:17:37PM 25 unconcentrated markets instead of a model for concentrated

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12:17:40PM 1 markets; do you recall him testifying to that?

12:17:42PM 2 A You mean the pricing model there you are referring to?

12:17:45PM 3 Q Yes.

12:17:46PM 4 A Yes, I recall him saying that.

12:17:48PM 5 Q And he said that you made up your own pricing rules. Do  
12:17:52PM 6 you remember reading that?

12:17:53PM 7 A Something to that effect. I think he referred to the  
12:17:58PM 8 Shapiro pricing model, which it's nice to have things named  
12:18:01PM 9 after you, but, in this case, I don't think it's really  
12:18:04PM 10 appropriate.

12:18:04PM 11 Q Is the pricing model that you use something you created  
12:18:08PM 12 especially for this case?

12:18:09PM 13 A No, no. So, first off, pricing model, all I'm doing here  
12:18:15PM 14 is saying, when costs go down, we would expect price to go  
12:18:22PM 15 down. It's simple. You can call it a model if you want. If  
12:18:26PM 16 you look at the economics textbooks, what we teach, not  
12:18:30PM 17 surprisingly, this idea is there, and the manner in which --  
12:18:35PM 18 let me put that differently. When costs go down, prices tend  
12:18:39PM 19 to go down.

12:18:41PM 20 The mechanism, what we call the pass-through rate, how  
12:18:46PM 21 much of the cost decreases get reflected in price decreases  
12:18:50PM 22 depends on the industry, how competitive it is, and I think I  
12:18:55PM 23 indicated that when I was on the stand before, but all of the  
12:18:59PM 24 models for different industries all have the same feature, that  
12:19:04PM 25 when the costs go down, everything else equal, we expect price

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12:19:09PM 1 to go down. And that is a general principle, and I certainly  
12:19:15PM 2 did not create it for this case.

12:19:17PM 3 Q What happened here when costs went down for Jeld-Wen's  
12:19:22PM 4 manufacturing of door skins?

12:19:24PM 5 A Well, the point being, the prices went up, their prices  
12:19:29PM 6 went up for door skins, and we measured how much. Again,  
12:19:31PM 7 that's not in dispute as between myself and Professor Snyder.

12:19:35PM 8 Q Now, do you recall Professor Snyder saying yesterday that  
12:19:39PM 9 you applied a rule that applies to unconcentrated markets, but  
12:19:43PM 10 this market that we're looking at, the door skin market, is a  
12:19:47PM 11 highly concentrated market; do you recall him saying that?

12:19:50PM 12 A Vividly.

12:19:52PM 13 Q What is your response to that point?

12:19:54PM 14 A So I think I partly responded earlier which is the  
12:20:02PM 15 principle I'm applying reflects a number of different models  
12:20:06PM 16 that economists have worked on, that when costs go down, it  
12:20:11PM 17 tends to pull prices down.

12:20:14PM 18 That's true in highly competitive or unconcentrated  
12:20:18PM 19 markets. It's also true in monopoly markets. It's also true  
12:20:22PM 20 in tight-knit -- oligopolies like this one with two or three  
12:20:26PM 21 firms. So I disagree -- I just think it's not true -- I  
12:20:33PM 22 disagree with him and specifically the principle I'm applying,  
12:20:39PM 23 namely that when cost goes down, price goes down, applies to  
12:20:44PM 24 markets whether they are concentrated or not and certainly  
12:20:47PM 25 apply in this highly concentrated market.

12:20:51PM 1 Q So let's go to another topic now. Professor Snyder  
12:20:55PM 2 testified yesterday that in the long run, firms need to set  
12:21:00PM 3 prices high enough to recover all of their costs, not just  
12:21:04PM 4 their average variable costs or, otherwise, they can't survive.  
12:21:08PM 5 Do you recall him saying that?

12:21:09PM 6 A I do.

12:21:10PM 7 Q Does that mean, in your view, that it's wrong to look at  
12:21:14PM 8 average variable costs when you are analyzing whether a merger  
12:21:17PM 9 substantially lessens competition?

12:21:20PM 10 A No. It's what we do all the time in merger analysis.

12:21:23PM 11 Q Why is it relevant to merger analysis?

12:21:25PM 12 A Well, first I would say that, in this case, I looked at  
12:21:33PM 13 Jeld-Wen's average variable costs, and I observed that at the  
12:21:39PM 14 time of the merger, they had roughly a 35 percent margin above  
12:21:45PM 15 that.

12:21:45PM 16 So I'm not saying -- I never said they were pricing equal  
12:21:49PM 17 to that. I just said they're pricing based on it. That's what  
12:21:54PM 18 you look at, and then you mark up, basically as much as you can  
12:21:57PM 19 given the competition. So their margin -- they already had a  
12:22:02PM 20 margin, and so -- and Professor Snyder did not assert that the  
12:22:09PM 21 margin was inadequate to cover their average total costs to  
12:22:13PM 22 stay in business.

12:22:14PM 23 So then -- so that's looking at the merger. Then over  
12:22:18PM 24 time, all of these pricing models, rules, all of the principles  
12:22:23PM 25 that economists look at would tell us that changes in prices

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12:22:28PM 1 over a period of time will track these changes in average  
12:22:37PM 2 variable costs, and that's what I've done.

12:22:41PM 3 Then his point, well, wait a moment, what if firms aren't  
12:22:45PM 4 covering their costs, they will eventually go out of business,  
12:22:47PM 5 that can happen in the longer run; okay? There's no suggestion  
12:22:51PM 6 here that I've heard that the door skin suppliers are failing  
12:22:56PM 7 to cover their average total costs with the margins they have.  
12:23:00PM 8 So that principle is true, but it doesn't affect what we're  
12:23:03PM 9 doing here, the analysis of price changes from 2012 into 2016  
12:23:08PM 10 or '17.

12:23:10PM 11 Q Professor Shapiro, I want to make sure the jury  
12:23:13PM 12 understands what you mean by margin. You said that Jeld-Wen  
12:23:15PM 13 had a 35 percent margin in 2012. What does that mean?

12:23:21PM 14 A So this means the gap between the price and the variable  
12:23:27PM 15 cost. So you could think about prices significantly higher  
12:23:32PM 16 than the variable cost, 35 percent, and that's a pretty healthy  
12:23:38PM 17 margin in the manufacturing industry generally.

12:23:38PM 18 Q Let's turn now to pricing and capacity. You recall  
12:23:44PM 19 reading the testimony by Professor Snyder where he said that  
12:23:48PM 20 capacity doesn't matter -- I'm sorry, where he described your  
12:23:51PM 21 testimony as being that capacity doesn't matter unless you run  
12:23:55PM 22 out of capacity; do you recall reading that?

12:23:57PM 23 A I do.

12:23:58PM 24 Q Is that a fair representation of what you said?

12:24:00PM 25 A I do not think it is a fair representation of what I said.

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12:24:03PM 1 Q What did you say about capacity?

12:24:05PM 2 A I said that one needs to look at capacity utilization,  
12:24:10PM 3 because if it gets tight due to increased demand, that can,  
12:24:15PM 4 indeed, pull up prices, and that I looked here at capacity in  
12:24:19PM 5 this industry, again comparing 2012 to '16, I think, 2016 I  
12:24:26PM 6 think it is, and the increase in capacity utilization was quite  
12:24:31PM 7 modest.

12:24:31PM 8 Q Let me pull up a slide to help, Professor Shapiro.

12:24:34PM 9 MR. POMERANTZ: Mr. Nichols, can you pull up 902.59.

12:24:41PM 10 Q This is a slide that you used when you here previously  
12:24:43PM 11 testifying; do you recall that?

12:24:44PM 12 A I do.

12:24:45PM 13 Q If you could use this slide to explain to the jury what  
12:24:47PM 14 you're saying about capacity.

12:24:49PM 15 A Okay. So the big blue areas are the ones that I would  
12:24:55PM 16 call your attention to. On the left-hand side, 2012,  
12:25:02PM 17 67 percent utilization. This is, as you can see on the  
12:25:06PM 18 vertical axis, Jeld-Wen's capacity utilization, and then in  
12:25:10PM 19 2016 it went up a bit to between 70 and 73 percent.

12:25:15PM 20 So my testimony is, my opinion is that this is a modest  
12:25:22PM 21 increase in capacity utilization, and I would not expect that  
12:25:28PM 22 to cause a substantial increase in prices. And I guess I would  
12:25:35PM 23 add, Professor Snyder, so far as I can recall, did not look at  
12:25:40PM 24 Jeld-Wen's capacity utilization. Period, I'm done there.

12:25:45PM 25 Q Did Professor Snyder, in any way, dispute that capacity

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12:25:49PM 1 has not gotten tight for Jeld-Wen?

12:25:52PM 2 A I'm sorry, I didn't hear the question.

12:25:52PM 3 Q Did Professor Snyder ever dispute that capacity has not  
12:25:56PM 4 gotten tight?

12:25:59PM 5 A I can't remember what he said on that actually.

12:26:04PM 6 Q We'll leave that for the record. So given the current  
12:26:08PM 7 demand in the housing market and comparing that to the 2005  
12:26:13PM 8 peak, is it surprising, in your view, that capacity is not  
12:26:16PM 9 tight at this point?

12:26:17PM 10 A No. After having studied this, and the jury has seen, I  
12:26:24PM 11 think, the key numbers, the peak in the housing starts in 2005  
12:26:29PM 12 was over two million. It was really a boom time, and even now,  
12:26:36PM 13 2016/2017, I think we're about 60 percent of that, 1.2 million  
12:26:42PM 14 starts, something like that.

12:26:44PM 15 So this is an industry that, as far as I can see for the  
12:26:48PM 16 foreseeable future, will have excess capacity, okay, unless --  
12:26:53PM 17 eventually some plants might close, things could change, but  
12:27:02PM 18 over this time period and right now, today, there is  
12:27:09PM 19 considerable available capacity because the peak was so high  
12:27:13PM 20 back in 2005 and '06.

12:27:15PM 21 Q Let me turn to another witness who testified after you  
12:27:19PM 22 testified here, and that's Mr. Bob Merrill. Have you read Mr.  
12:27:24PM 23 Merrill's testimony?

12:27:25PM 24 MR. PFEIFFER: Your Honor, may we be heard on this?

12:27:32PM 25 I was of the understanding from earlier today that the experts



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12:27:35PM 1 were not to talk about the evidence that came in through other  
12:27:38PM 2 witnesses.

12:27:40PM 3 THE COURT: You weren't to comment on the testimony  
12:27:42PM 4 of other witnesses.

12:27:44PM 5 MR. PFEIFFER: As we're being -- as we're getting --

12:27:48PM 6 THE COURT: Why don't we wait to hear the question.  
12:27:51PM 7 Don't answer the question, because there may be an objection.

12:27:55PM 8 MR. POMERANTZ: I am going to ask him to comment on  
12:27:57PM 9 testimony of Mr. Merrill. I thought that was permissible.

12:28:00PM 10 MR. PFEIFFER: Your Honor, I think, as was clearly  
12:28:02PM 11 established this morning, that's not what we're supposed to be  
12:28:05PM 12 doing with the experts.

12:28:06PM 13 MR. POMERANTZ: I wasn't here, I think, for that part  
12:28:08PM 14 of it.

12:28:08PM 15 THE COURT: Come up here, please.

12:28:14PM 16  
12:28:14PM 17 (Discussion at sidebar as follows:)

12:28:15PM 18  
12:28:15PM 19 THE COURT: It depends on what the question and the  
12:28:17PM 20 answer is. What are you asking him?

12:28:20PM 21 MR. POMERANTZ: Merrill said that CraftMaster did not  
12:28:22PM 22 consider its capacity in raising prices when demand increased,  
12:28:26PM 23 and he then went on and said that CraftMaster would increase  
12:28:30PM 24 prices in response to demand when they could get away with it  
12:28:34PM 25 given the competition they faced.

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12:28:35PM 1 THE COURT: So what are you going to ask this  
12:28:37PM 2 witness?

12:28:37PM 3 MR. POMERANTZ: I'm then going to ask him how does  
12:28:41PM 4 that relate to your response to Professor Snyder's opinion on  
12:28:45PM 5 capacity.

12:28:46PM 6 THE COURT: I think he can do that, because he's not  
12:28:48PM 7 commenting on the -- editorializing on the testimony. He's  
12:28:52PM 8 just saying how does that testimony affect your comment with  
12:28:56PM 9 respect to Snyder.

12:28:57PM 10 MR. PFEIFFER: So then am I allowed, basically, to do  
12:29:00PM 11 the same thing on my cross, point to him, you are aware  
12:29:04PM 12 so-and-so testified X?

12:29:05PM 13 THE COURT: Until I see what you do, I don't know.

12:29:07PM 14 MR. PFEIFFER: Okay, Your Honor.

12:29:08PM 15 THE COURT: Conceptually you can do the same thing  
12:29:11PM 16 he's doing, but whether you are doing it is a different issue.

12:29:14PM 17

12:29:14PM 18 (End of sidebar discussion.)

12:29:22PM 19

12:29:22PM 20 Q All right, Professor Shapiro, I was referring you to Mr.  
12:29:25PM 21 Merrill's testimony; do you recall that?

12:29:27PM 22 A I do.

12:29:27PM 23 Q And do you recall that Mr. Merrill testified that

12:29:30PM 24 CraftMaster did not consider its capacity in raising prices

12:29:34PM 25 when demand increased?

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12:29:36PM 1 A I recall he spoke to that issue, yes.

12:29:38PM 2 Q And do you recall him also testifying that CraftMaster  
12:29:42PM 3 would increase prices in response to demand when they could get  
12:29:47PM 4 away with it given the competition they faced? Do you recall  
12:29:49PM 5 that testimony?

12:29:50PM 6 A I do, yes.

12:29:51PM 7 Q How does that testimony relate to your response to  
12:29:55PM 8 Professor Snyder about capacity?

12:29:57PM 9 A I think it's directly relevant. As I understand Mr.  
12:30:03PM 10 Merrill's testimony, just what you just said, when they can get  
12:30:11PM 11 away with it -- was that the exact word?

12:30:14PM 12 Q I think what he said was when they could get away with it.

12:30:17PM 13 A That, I believe, is referring to competition --

12:30:21PM 14 MR. PFEIFFER: Your Honor, now is he expressly  
12:30:23PM 15 interpreting what Mr. Merrill said.

12:30:25PM 16 MR. POMERANTZ: I'll complete the quote.

12:30:27PM 17 Q What Mr. Merrill said, and I have a quote --

12:30:30PM 18 THE COURT: The question is not what -- without  
12:30:34PM 19 repeating it or judging it or anything else, how did what  
12:30:37PM 20 Merrill said affect your response to Snyder. That's the only  
12:30:44PM 21 question on the table, and that's the one he can answer.

12:30:46PM 22 MR. POMERANTZ: Correct.

12:30:48PM 23 THE WITNESS: Okay. Give me a moment. I want to get  
12:30:58PM 24 it right. When capacity utilization is relatively low,  
12:31:12PM 25 attempts by a company to raise price may well be unsuccessful

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12:31:21PM 1 if they face competition because their competitors will also  
12:31:29PM 2 have extra capacity and will be keen to fill their plants. So  
12:31:33PM 3 the ability to raise price depends not just on capacity  
12:31:37PM 4 utilization and demand but on the degree of competition the  
12:31:41PM 5 company faces.

12:31:42PM 6 Q All right. And I want to direct you to another piece of  
12:31:46PM 7 evidence that relates to Professor Snyder's opinion about  
12:31:50PM 8 capacity.

12:31:51PM 9 MR. POMERANTZ: Mr. Nichols, could you pull up  
12:31:54PM 10 Exhibit 302.

12:31:56PM 11 Q This is the Masonite May 8th presentation that we've seen  
12:32:01PM 12 previously in this case. You relied on this in your report,  
12:32:05PM 13 didn't you?

12:32:05PM 14 A Yes, sir.

12:32:07PM 15 MR. POMERANTZ: Mr. Nichols, could you pull up page  
12:32:09PM 16 12. And I want to focus on the portion near the bottom with  
12:32:15PM 17 the sentence that begins "I do not believe," kind of in the  
12:32:19PM 18 middle there. If you can highlight that whole sentence.

12:32:26PM 19 Q What Masonite is saying here is, "I do not believe that  
12:32:31PM 20 the pricing dynamics necessarily need to follow capacity  
12:32:35PM 21 utilization, however, because if you think about the fact that  
12:32:38PM 22 there's only two vertically integrated players that exist in  
12:32:41PM 23 this space today, it's really more a matter of how one thinks  
12:32:45PM 24 about the value they want to try and derive from their products  
12:32:49PM 25 in the marketplace today." Do you see that?

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12:32:51PM 1 A I do.

12:32:52PM 2 Q How does the statement by Masonite relate to your response  
12:32:56PM 3 to Professor Snyder about capacity?

12:32:58PM 4 MR. PFEIFFER: Your Honor, we have an objection to  
12:33:03PM 5 this as hearsay, so it should not be considered by the jury for  
12:33:06PM 6 the truth of what's asserted there.

12:33:10PM 7 THE COURT: Which is this? Which presentation is  
12:33:13PM 8 this?

12:33:13PM 9 MR. POMERANTZ: This is the May 8th, 2014,  
12:33:14PM 10 presentation by Masonite, and, number one, we're not offering  
12:33:18PM 11 it for the truth.

12:33:19PM 12 THE COURT: I dealt with the hearsay objection at the  
12:33:23PM 13 pretrial conference by using the -- and in connection with the  
12:33:30PM 14 affidavit that some fellow presented, but did it relate to this  
12:33:35PM 15 document?

12:33:37PM 16 MR. POMERANTZ: This document is already in evidence.  
12:33:39PM 17 We used it yesterday with Mr. Hachigian.

12:33:42PM 18 THE COURT: The objection is overruled.

12:33:46PM 19 A This is very consistent with my view of the market which  
12:33:49PM 20 is -- and the role of capacity utilization in particular, which  
12:33:55PM 21 is even if there's excess capacity, if you have only two  
12:33:59PM 22 suppliers, they're likely to have significant pricing power,  
12:34:04PM 23 and they may be able to raise price notwithstanding the excess  
12:34:09PM 24 capacity.

12:34:09PM 25 But if you have more competition, it will tend to keep

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12:34:13PM 1 that from happening. It will keep the prices from going up,  
12:34:17PM 2 because the different suppliers will be eager to fill their  
12:34:21PM 3 plants, and that will be good for customers.

12:34:24PM 4 Q All right. I want to turn to a different subject, and  
12:34:29PM 5 that is the entry into the market by either a new door skin  
12:34:34PM 6 plant owner or by a foreign supplier.

12:34:36PM 7 MR. PFEIFFER: Your Honor, if I may --

12:34:38PM 8 MR. POMERANTZ: I withdraw that. Actually, you're  
12:34:42PM 9 right.

12:34:44PM 10 THE COURT: A signal moment they agreed on something.

12:34:49PM 11 MR. POMERANTZ: I am not going to ask you that  
12:34:51PM 12 question.

12:34:52PM 13 THE WITNESS: I can live with that.

12:34:54PM 14 Q Did you see Professor Snyder's discussion in the  
12:34:58PM 15 transcript you read where he used the term but-for world?

12:35:02PM 16 A Yes, I did.

12:35:03PM 17 Q And did you understand what he meant by but-for world?

12:35:05PM 18 A I do. I did. I understand.

12:35:08PM 19 Q What do you understand that term to mean?

12:35:10PM 20 A It's referring to how things would have played out if the  
12:35:14PM 21 merger had not taken place.

12:35:16PM 22 Q Now, have you already analyzed the but-for world in this  
12:35:20PM 23 merger?

12:35:21PM 24 A Yes, I have.

12:35:22PM 25 Q Why did you do that?

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12:35:25PM 1 A Well, the question fundamentally I'm asking is did the  
12:35:30PM 2 merger substantially lessen competition, and implicit in that  
12:35:36PM 3 is compared with the merger not happening. So the merger not  
12:35:41PM 4 happening, that's another -- that's the but-for world, as his  
12:35:46PM 5 term, which is a commonly used term, so, of course, I've been  
12:35:50PM 6 thinking a great deal about that, and much of my testimony  
12:35:55PM 7 related to how things would have played out if the merger had  
12:35:59PM 8 not taken place.

12:36:00PM 9 Q So the but-for world, in your view, is the market in which  
12:36:04PM 10 Jeld-Wen never acquired CraftMaster; right?

12:36:08PM 11 A That's right. What we do is we go back to 2012. We then  
12:36:13PM 12 imagine the merger didn't take place, CraftMaster remains as an  
12:36:18PM 13 independent supplier, what would happen as best we could tell,  
12:36:24PM 14 and then we're comparing that to what actually happened when  
12:36:27PM 15 the merger did occur.

12:36:28PM 16 Q And so did you actually analyze then how competition would  
12:36:33PM 17 have been different between the actual world with the merger  
12:36:36PM 18 and the but-for world without the merger?

12:36:38PM 19 A That's essentially all of my analysis, is to do exactly  
12:36:43PM 20 that so I can determine the effect of the merger.

12:36:46PM 21 Q So if Professor Snyder said you didn't do that, he's just  
12:36:50PM 22 wrong?

12:36:51PM 23 A That would be incorrect for him to say that.

12:36:55PM 24 Q What was the first step of your analysis of the but-for  
12:36:59PM 25 world?

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12:36:59PM 1 A Well, what we always do essentially is we look at the  
12:37:03PM 2 market structure and the concentration. So because -- the  
12:37:06PM 3 merger went from three to two, and so the first step is to see  
12:37:12PM 4 how big a change in market structure or concentration was  
12:37:17PM 5 caused, and that's part of the analysis of the but-for world,  
12:37:20PM 6 because the world without the merger, in this case without the  
12:37:25PM 7 three firms, the market would be less concentrated. So we're  
12:37:29PM 8 comparing the market concentration with and without the merger.

12:37:32PM 9 Q Let me help explain this to the jury.

12:37:36PM 10 MR. POMERANTZ: Phil, could you bring up 902.22.

12:37:42PM 11 Q Could you remind the jury what this is and how it relates  
12:37:44PM 12 to your analysis of the but-for world?

12:37:46PM 13 A Certainly. So the title again, Market Concentration:  
12:37:52PM 14 Door Skin Sales in the United States. So this is our HHI index  
12:37:56PM 15 that we used to measure concentration. The 3,820 was the  
12:38:02PM 16 measure before the merger. The merger caused concentration to  
12:38:06PM 17 go up by 1,213 points up to a little over 5,000. You can see  
12:38:11PM 18 the market shares there which is what we used for this  
12:38:14PM 19 calculation.

12:38:15PM 20 We're in this highly concentrated zone. So when we look  
12:38:22PM 21 at the change in the Herfindahl, that's our way of saying how  
12:38:26PM 22 much did the actual world, with the 5,000 index, compare with  
12:38:30PM 23 the but-for world which was a 3,820 index. So the reason we  
12:38:36PM 24 focus on the increase, here 1,200, is because we're comparing  
12:38:39PM 25 the actual and the but-for world.



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12:38:42PM 1 So that's a starting point, and, again, to remind the  
12:38:45PM 2 jury, when we have a merger like this, we're in the highly  
12:38:48PM 3 concentrated zone with a very large increase, we have a strong  
12:38:53PM 4 prediction right out of the box that without the merger, the  
12:38:58PM 5 market would be significantly more competitive. That's the  
12:39:00PM 6 first step.

12:39:01PM 7 Q I just want to make sure the record is clear. So after  
12:39:06PM 8 the merger, Jeld-Wen had a market share of 54 percent, and  
12:39:10PM 9 Masonite had a market share of 46 percent; right?

12:39:12PM 10 A That's correct. Those are the numbers that lead to the  
12:39:15PM 11 5,033 measure shown on the diagram.

12:39:18PM 12 Q And the 3,820 on the index, that's because you are  
12:39:22PM 13 counting the market shares before the merger where Jeld-Wen had  
12:39:28PM 14 38 percent, CraftMaster had 16 percent, and Masonite still had  
12:39:32PM 15 its 46 percent; correct?

12:39:33PM 16 A That's correct.

12:39:34PM 17 Q Now, how does analyzing market concentration in this  
12:39:40PM 18 economist HHI world, how does that actually compare the actual  
12:39:46PM 19 world with the but-for world?

12:39:48PM 20 A So, again, let's talk about this but-for world. We would  
12:39:52PM 21 have, in this case, three firms competing independently:  
12:39:59PM 22 Jeld-Wen, Masonite, and CraftMaster. The market shares and the  
12:40:03PM 23 concentration are one way of measuring how competitive. It's  
12:40:07PM 24 still highly concentrated, but it's a lot better than the  
12:40:10PM 25 5,000. So it's really a way of starting to track the

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12:40:14PM 1 significance of having CraftMaster in the market as an  
12:40:18PM 2 independent competitor rather than acquired by Jeld-Wen, and  
12:40:22PM 3 that's what this Herfindahl index is already directing us to,  
12:40:27PM 4 the importance of CraftMaster as an independent competitor.

12:40:30PM 5 Q Professor Snyder said yesterday that the door skin market  
12:40:35PM 6 was highly concentrated before the merger and it was highly  
12:40:39PM 7 concentrated after the merger and, therefore, I guess it  
12:40:42PM 8 doesn't matter. Do you agree with him?

12:40:46PM 9 A Well, let me put it this way: I think Professor Snyder  
12:40:51PM 10 and I agree that the -- he didn't dispute any of the Herfindahl  
12:40:57PM 11 calculations in the market definitions, and it's true. Market  
12:41:01PM 12 was highly concentrated before and after, but it became a lot  
12:41:04PM 13 more concentrated. That 1,200 bump-up, that's a lot. Anything  
12:41:10PM 14 above 200 gets our attention -- this is 1,200 -- in terms of  
12:41:14PM 15 the bump-up.

12:41:15PM 16 So if he is suggesting that 3,800, 5,000, is high either  
12:41:22PM 17 way, I strongly disagree. There's a significant difference,  
12:41:26PM 18 and that reflects the difference between two and three  
12:41:29PM 19 competitors.

12:41:30PM 20 Q All right. So how would the ongoing presence of CMI in  
12:41:36PM 21 the market have affected competition, in your view?

12:41:40PM 22 A So in the -- without the merger in the but-for world, CMI  
12:41:45PM 23 is an independent competitor. They had about 16 percent share  
12:41:50PM 24 prior to the merger. So the but-for world, we have to imagine,  
12:42:00PM 25 based on all the evidence we have, CraftMaster with that market

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12:42:04PM 1 share owning the Towanda facility -- that's their main key  
12:42:08PM 2 asset in this market, which is a large, relatively recent,  
12:42:12PM 3 relatively efficient facility, they would be competing with  
12:42:16PM 4 that, with that asset and their other assets, and that's a  
12:42:21PM 5 significant factor in the market, having that third competitor,  
12:42:25PM 6 and that's what was lost.

12:42:27PM 7 And it's my view that in that world, with CraftMaster  
12:42:31PM 8 continuing to compete, the door skin prices would have been --  
12:42:35PM 9 come down as costs came down, and that's something we never  
12:42:38PM 10 saw. Instead, we saw prices go up.

12:42:41PM 11 MR. POMERANTZ: Professor Shapiro, I don't have any  
12:42:43PM 12 further questions. Thank you.

12:42:49PM 13 THE COURT: Mr. Pfeiffer.

12:42:51PM 14 MR. PFEIFFER: Thank you, Your Honor.

12:42:52PM 15

12:42:52PM 16 CROSS-EXAMINATION

12:42:56PM 17 BY MR. PFEIFFER:

12:42:56PM 18 Q Hi.

12:43:03PM 19 A Hello, Mr. Pfeiffer.

12:43:05PM 20 Q Now, you agree that the but-for world you were just  
12:43:09PM 21 talking about has to take into account all of the facts that  
12:43:13PM 22 existed in the real world before the merger that didn't change  
12:43:17PM 23 because of the merger; right?

12:43:19PM 24 A It should reflect --

12:43:21PM 25 Q Is that a yes, sir?

12:43:24PM 1 A No -- all of the facts sounds -- I can't take into account  
12:43:29PM 2 all of the facts. That's not a practical way to do things, so  
12:43:32PM 3 I would not say yes to that. I was going to explain what one  
12:43:34PM 4 does.

12:43:34PM 5 Q So the but-for world would not keep the same facts that  
12:43:38PM 6 the merger didn't change; is that your testimony?

12:43:41PM 7 A If things weren't going to change by the merger, then they  
12:43:46PM 8 would be part of the but-for world --

12:43:48PM 9 Q Thank you. For example, however the evidence in this case  
12:43:52PM 10 shows that companies in this door skin market priced relative  
12:43:58PM 11 to their average variable costs before the market, you are not  
12:44:01PM 12 assuming that the but-for world they would price any  
12:44:05PM 13 differently relative to average variable costs, are you?

12:44:08PM 14 A I'm not assuming some change in behavior of the merger.  
12:44:14PM 15 I'm assuming the competition would have continued the way it  
12:44:17PM 16 was.

12:44:17PM 17 Q And however companies priced relative to their capacity  
12:44:21PM 18 utilization in the door skins market before the merger, you  
12:44:24PM 19 assume they would price the same way relative to capacity  
12:44:27PM 20 utilization in the but-for world; right?

12:44:30PM 21 A That's one factor to consider, capacity utilization.

12:44:34PM 22 Q That wasn't my question. My question is, your but-for  
12:44:37PM 23 world would assume that companies in the door skin market would  
12:44:39PM 24 price the same way relative to capacity utilization as they had  
12:44:45PM 25 before the merger; yes or no?

12:44:47PM 1 A Everything else equal, that's fair enough.

12:44:50PM 2 Q And, again, as I think you said, you agree that in the  
12:44:53PM 3 but-for world, the door skins market would be highly  
12:44:57PM 4 concentrated still; correct?

12:44:59PM 5 A Yes.

12:45:00PM 6 Q Now, you mentioned earlier that from 2006 to 2012, door  
12:45:13PM 7 skin prices went down but only by a small percentage overall;  
12:45:18PM 8 is that correct?

12:45:18PM 9 A Well, I was able to look at the door skin prices paid by  
12:45:21PM 10 Steves. That's what I believe I was referring to.

12:45:24PM 11 Q And that's the measure you used?

12:45:26PM 12 A Yes, that's the one I was testifying about.

12:45:28PM 13 Q And Steves, during that entire period, was subject to a  
12:45:36PM 14 long-term pricing agreement with Jeld-Wen for a substantial  
12:45:39PM 15 portion of its needs, for some years all of its needs; right?

12:45:43PM 16 A No -- well, that's misleading to say that there was an  
12:45:48PM 17 LTA, but remember we showed in the CARB episode how Steves  
12:45:52PM 18 moved a large share of their business away from Jeld-Wen even  
12:45:55PM 19 though they were under the LTA.

12:45:57PM 20 Q Sir, please don't characterize my question. Let me take  
12:45:59PM 21 you back to my question. You agree that Steves bought a  
12:46:01PM 22 substantial portion of its door skins, from the 2006 to 2012  
12:46:09PM 23 period, under a long-term supply agreement with Jeld-Wen;  
12:46:13PM 24 correct?

12:46:15PM 25 A Depends on what you mean by substantial, because it was

12:46:18PM 1 very high, and then it declined quite a bit, but that's the  
12:46:21PM 2 facts.

12:46:22PM 3 Q Now, so you haven't actually analyzed what happened to the  
12:46:28PM 4 price of door skins on a market-wide basis from 2006 to 2012,  
12:46:33PM 5 have you?

12:46:33PM 6 A Well, I don't think that I had reliable data on that. I  
12:46:39PM 7 do know that Professor Snyder has an exhibit where he purports  
12:46:42PM 8 such numbers.

12:46:43PM 9 Q Back to my question, sir. Whether you think you had the  
12:46:45PM 10 reliable data to do it, you did not do an analysis of  
12:46:50PM 11 market-wide pricing of door skins from 2006 to 2012, did you,  
12:46:54PM 12 sir?

12:46:54PM 13 A That is correct, I did not.

12:46:56PM 14 Q And, again, the pricing at that time, from 2006 to 2012,  
12:47:01PM 15 that was pricing in a highly concentrated market, according to  
12:47:05PM 16 you; right?

12:47:05PM 17 A Yes, the market has been highly concentrated throughout  
12:47:08PM 18 this period.

12:47:09PM 19 Q And you have offered no analysis in this case to determine  
12:47:18PM 20 the extent to which the highly concentrated nature of the door  
12:47:23PM 21 skin market before the merger explains why prices didn't go  
12:47:28PM 22 down by more than they did from 2006 to 2012, have you?

12:47:34PM 23 A I don't think that particular point is addressed in my  
12:47:37PM 24 reports.

12:47:37PM 25 Q Thank you. Now, you talked about capacity utilization.

12:47:44PM 1 You didn't look at how companies priced -- door skin companies  
12:47:51PM 2 priced in relation to their capacity utilization before the  
12:47:55PM 3 merger, did you?

12:47:56PM 4 A It was part of my line of inquiry. I don't recall  
12:48:03PM 5 learning enough to put anything about that in my reports.

12:48:06PM 6 Q But we can agree, capacity utilization must have dropped  
12:48:09PM 7 quite a bit in the door skin industry as the housing market  
12:48:14PM 8 plummeted from that 2006 peak of over two million housing  
12:48:19PM 9 starts to roughly 500-something thousand at the bottom; right?

12:48:23PM 10 A I agree with that.

12:48:24PM 11 Q But as you said, although capacity utilization must have  
12:48:29PM 12 dropped substantially as a result of that, door skin prices,  
12:48:32PM 13 according to your analysis, what you could determine, didn't  
12:48:35PM 14 drop by very much at all from 2006 to 2012, did they?

12:48:40PM 15 A They did not.

12:48:41PM 16 Q Now, you talked about an analysis of average variable cost  
12:48:45PM 17 as part of your pricing analysis, but your calculation of  
12:48:50PM 18 average variable costs used Jeld-Wen's actual costs; right?

12:48:55PM 19 A Yes, that's fair.

12:48:59PM 20 Q When you looked at those costs, then, they included actual  
12:49:03PM 21 costs after Jeld-Wen had bought the Towanda facility as part of  
12:49:07PM 22 the CMI acquisition; right?

12:49:09PM 23 A The total did, although we had plant-level data, so not  
12:49:13PM 24 all of the components I looked at included Towanda.

12:49:16PM 25 Q But where they were part of what you looked at, they were

12:49:19PM 1 in the mix; right?

12:49:20PM 2 A Yes.

12:49:23PM 3 Q And so then those costs that you looked at where they  
12:49:29PM 4 included Towanda, by definition, included any cost savings that  
12:49:33PM 5 Jeld-Wen realized by virtue of acquiring CMI; right?

12:49:39PM 6 A That's correct when I included Towanda, and that's why I  
12:49:42PM 7 also broke things out as well.

12:49:45PM 8 Q And so where you included the Towanda costs, we can agree  
12:49:49PM 9 those are not costs as they would have existed in the but-for  
12:49:53PM 10 world, can't we?

12:49:53PM 11 A I have no basis for thinking there were significant  
12:49:58PM 12 merger-specific efficiencies, so I think those would be similar  
12:50:03PM 13 to the costs in the but-for world.

12:50:04PM 14 Q You haven't studied that to be able to say, have you?

12:50:07PM 15 A I'm using their actual cost data, and I looked to see  
12:50:16PM 16 whether there were claims of merger-specific efficiencies, so  
12:50:22PM 17 in that sense, I did study the question, yes.

12:50:24PM 18 Q Well, you understand that there was testimony in this case  
12:50:28PM 19 from Jeld-Wen witnesses that went to the issue of efficiencies;  
12:50:31PM 20 have you read that testimony?

12:50:33PM 21 A Yes, I have.

12:50:34PM 22 Q You are not here to judge or dispute that testimony, are  
12:50:36PM 23 you?

12:50:37PM 24 THE COURT: He can't, so let's go on.

12:50:40PM 25 MR. PFEIFFER: Thank you, Your Honor.



12:50:41PM 1 THE COURT: He knows that, and you know it.

12:50:43PM 2 Q Now, you talked about price increases in a post-recession  
12:50:48PM 3 world not being automatic; is that basically what you said?

12:50:53PM 4 A I did say that.

12:50:54PM 5 Q But they are common, aren't they, price increases coming  
12:50:58PM 6 out of a recession?

12:51:00PM 7 A I think it just varies all over the place. For example,  
12:51:03PM 8 wage rates have not come up much at all, to the disappointment  
12:51:07PM 9 of many, so I don't know that I would say it's common or it's  
12:51:11PM 10 common and so is the opposite.

12:51:13PM 11 Q You recall that Dean Snyder presented evidence of price  
12:51:19PM 12 increases by a number of different measures in the building  
12:51:23PM 13 products industry for products other than door skins after the  
12:51:26PM 14 merger, don't you?

12:51:27PM 15 A I saw that.

12:51:28PM 16 Q And you didn't do a countervailing study showing price  
12:51:32PM 17 decreases in any products in the building products industry,  
12:51:35PM 18 did you?

12:51:36PM 19 A I did not do that. No, I don't think that's relevant,  
12:51:39PM 20 because the costs and capacity conditions differ from industry  
12:51:43PM 21 to industry. I don't think it's a good benchmark.

12:51:46PM 22 Q You didn't do any analysis, sir, to show that any of those  
12:51:49PM 23 other sellers' products didn't increase their margins after the  
12:51:53PM 24 recession, did you?

12:51:54PM 25 A I did not look in detail at those industries, no, and

12:51:57PM 1 those are, by the way, aggregates of many different markets  
12:52:03PM 2 anyhow.

12:52:03PM 3 Q Well, there were also individual products listed, weren't  
12:52:06PM 4 there?

12:52:06PM 5 A The two indices that I believe were reported were not  
12:52:10PM 6 specific markets. They were broader than that, as I recall.

12:52:12PM 7 Q And you recall there were other individual products  
12:52:14PM 8 besides those indices that Dean Snyder talked about, didn't he?

12:52:17PM 9 A I remember the windows going up one percent, and there  
12:52:20PM 10 were some other products. I thought you were talking about the  
12:52:24PM 11 indexes though. Yes, there were other products.

12:52:26PM 12 Q On the issue of output, to be clear, you did no  
12:52:30PM 13 quantitative analysis of what output would have been in the  
12:52:35PM 14 but-for world in which Jeld-Wen had not acquired CMI; right?

12:52:40PM 15 A No, that's not correct.

12:52:43PM 16 Q You offered a quantitative analysis of what the level of  
12:52:46PM 17 output would have been in the but-for world?

12:52:49PM 18 A I have the pieces --

12:52:51PM 19 Q It's not my question whether you could have assembled it.  
12:52:53PM 20 Did you offer that quantitative analysis in your opinions in  
12:52:56PM 21 this case?

12:52:57PM 22 A It's not something I presented to the jury. It was  
12:53:00PM 23 something I did separately, that's fair.

12:53:03PM 24 MR. PFEIFFER: Thank you, Dr. Shapiro. That's my  
12:53:06PM 25 questions.

12:53:06PM 1 THE COURT: Any redirect?

12:53:08PM 2 MR. POMERANTZ: No, Your Honor.

12:53:08PM 3 THE COURT: Can he be excused permanently?

12:53:10PM 4 MR. POMERANTZ: Yes, Your Honor, fine with us.

12:53:13PM 5 THE COURT: Thank you, Dr. Shapiro, for being with us  
12:53:15PM 6 and giving us your testimony. You are now released to go about  
12:53:18PM 7 your business.

12:53:19PM 8 Ladies and gentlemen, your lunch is here in the jury  
12:53:24PM 9 room. We'll take 45 minutes for lunch, and then they will have  
12:53:34PM 10 another witness or two or something -- I don't know how many,  
12:53:38PM 11 and then we'll finish that testimony. The case will then be  
12:53:43PM 12 over whenever the witnesses are over, and I have some things to  
12:53:46PM 13 do with the attorneys to get ready for tomorrow morning. So  
12:53:49PM 14 you take your lunch recess at this time. Just take your pads  
12:53:53PM 15 with you. Thank you.

12:54:01PM 16  
12:54:07PM 17 (Jury out.)

12:54:07PM 18  
12:54:15PM 19 THE COURT: How many more witnesses do you have?

12:54:18PM 20 MR. POMERANTZ: Just one, Your Honor. Mr. Tucker  
12:54:20PM 21 will come back.

12:54:22PM 22 THE COURT: So -- then after lunch we will have time  
12:54:26PM 23 to go over these matters that pertain to the instructions and  
12:54:28PM 24 the verdict form without setting the new courthouse record for  
12:54:40PM 25 late stays for jury instruction conferences. All right, thank

12:54:46PM 1 you very much. We'll be in recess for 45 minutes.

12:54:49PM 2

12:54:49PM 3 (Luncheon recess.)

01:47:48PM 4

01:47:48PM 5 THE COURT: We have some problem?

01:47:54PM 6 MR. BUTERMAN: Yes, Your Honor. Just a moment ago we  
01:48:01PM 7 received from Steves the documents that they intend to use with  
01:48:06PM 8 Mr. Tucker in his upcoming examination.

01:48:10PM 9 THE COURT: Are you talking about demonstratives or  
01:48:12PM 10 exhibits?

01:48:12PM 11 MR. BUTERMAN: Exhibits, neither of which has been --  
01:48:16PM 12 neither of which is part of this case. One is a third-party  
01:48:20PM 13 transcript from February 23rd, 2017. It's a Masonite  
01:48:26PM 14 transcript. It's not part of anything that we've dealt with in  
01:48:29PM 15 this case. It doesn't have a PX number. Your Honor has never  
01:48:33PM 16 ruled on it, so it's completely hearsay. It's nothing,  
01:48:38PM 17 frankly.

01:48:38PM 18 THE COURT: Is it being offered in evidence?

01:48:41PM 19 MR. BUTERMAN: No, Your Honor.

01:48:43PM 20 MR. DANE: No, Your Honor.

01:48:43PM 21 MR. BUTERMAN: We don't believe it should go in front  
01:48:45PM 22 of the jury because it's completely prejudicial --

01:48:49PM 23 THE COURT: Must be really bad. Let me see it.  
01:48:55PM 24 Can't wait to see this thing.

01:48:57PM 25 MR. DANE: It's not that exciting, Your Honor.

01:49:05PM 1 THE COURT: Edited transcript of the earnings call,  
01:49:09PM 2 okay. Is this one of the earnings calls that's been put into  
01:49:13PM 3 evidence?

01:49:14PM 4 MR. BUTERMAN: No, Your Honor.

01:49:14PM 5 MR. DANE: If Your Honor would like, I can explain  
01:49:16PM 6 what the intended use was of this document, and I can also  
01:49:19PM 7 direct --

01:49:20PM 8 THE COURT: Why don't you come to the lectern so the  
01:49:23PM 9 court reporter can hear you, and tell me what's up and why this  
01:49:28PM 10 thing is here.

01:49:29PM 11 MR. DANE: This was simply -- Your Honor, this is a  
01:49:30PM 12 document that Mr. Tucker did, in fact, cite in his expert  
01:49:36PM 13 reports as one of the documents he had relied in support of his  
01:49:38PM 14 opinions on housing starts, and I was just going to use it to  
01:49:42PM 15 ask him about his supports since that was challenged by Mr.  
01:49:46PM 16 Kaplan today in his testimony.

01:49:47PM 17 THE COURT: You can ask him about it. You can ask  
01:49:50PM 18 him what he considered as long as it's part of what experts  
01:49:54PM 19 usually consider, but that doesn't put the document into  
01:49:57PM 20 evidence.

01:49:58PM 21 MR. DANE: I was not going to seek to move it into  
01:50:03PM 22 evidence.

01:50:03PM 23 THE COURT: Does that solve your problem?

01:50:05PM 24 MR. BUTERMAN: Respectfully, no, Your Honor. We  
01:50:09PM 25 believe that it's still prejudicial to put it in front of the

1 jury. Clearly they're putting it in front of the jury for a  
2 reason --

3 THE COURT: I thought that he said he's not going to  
4 display it to the jury. He's going to ask him if he considered  
5 a conference call and information about housing starts in  
6 arriving at his conclusion.

7 MR. BUTERMAN: If he's not planning on reading in the  
8 testimony or reading out loud the testimony, then we don't have  
9 a problem with this, Your Honor.

10 THE COURT: I'm sure he's going to say did you get  
11 some -- what are you going to ask him, Mr. Dane?

12 MR. DANE: The relevant page is page 19, and there  
13 are two page numbers here. It's actually the smaller one, so I  
14 guess it's page 35 if you look at the lower-down number.

15 THE COURT: Wait a minute. 19 is smaller than 35?

16 MR. DANE: I'm sorry, Your Honor. Easier one to look  
17 at is page 35 in the low right-hand corner. It's the next to  
18 the last page.

19 THE COURT: Where on there are you talking about?

20 MR. DANE: So there's a statement by a John Baugh  
21 where he's asking for clarification on assumptions for 2019  
22 regarding housing starts. That's at the top of the page, and  
23 the response from this Russ Tiejema is, "Our general view is  
24 1.5 million units by the time that we get into 2019, and it's  
25 just that evidence that we were planning -- I was planning to

01:51:52PM 1 ask Mr. Tucker about, that this was something that he had  
01:51:55PM 2 relied on as part of forming his opinion that 1.5 million  
01:52:01PM 3 housing starts a year was reasonable.

01:52:02PM 4 MR. BUTERMAN: In his expert report, he simply does  
01:52:04PM 5 not state that at all, Your Honor. It's not been -- his  
01:52:10PM 6 testimony about how he came up with the numbers --

01:52:13PM 7 THE COURT: Let me see it. Let me see what you are  
01:52:16PM 8 talking about. I have to read it and see it before I can make  
01:52:20PM 9 a decision on whether you are right about it. Your objection  
01:52:28PM 10 is that he didn't use this in his expert report. Mr. Dane said  
01:52:34PM 11 he did. Mr. Dane, where does he use it?

01:52:44PM 12 MR. DANE: Your Honor, if I can approach, I can show  
01:52:56PM 13 Your Honor where Mr. Tucker references --

01:52:58PM 14 THE COURT: You need to show Mr. Buterman first.  
01:53:25PM 15 Your first objection was that he -- it wasn't in his report,  
01:53:29PM 16 and I want to know -- do you now agree that it is in his  
01:53:32PM 17 report?

01:53:33PM 18 MR. BUTERMAN: Yes, Your Honor. He says based on  
01:53:36PM 19 available forecasts of housing starts, I estimated that housing  
01:53:40PM 20 starts would reach 1.5 million by 2022. Then he cites to --

01:53:48PM 21 MR. DANE: It's actually the previous sentence.  
01:53:50PM 22 Sorry. It's this sentence.

01:53:54PM 23 THE COURT: Do you agree he cites to it in his  
01:53:56PM 24 report?

01:53:57PM 25 MR. BUTERMAN: Yes, in a footnote, Your Honor.

01:54:00PM 1 THE COURT: So he does. That objection is overruled.

01:54:02PM 2 What's the next one?

01:54:03PM 3 MR. BUTERMAN: He didn't testify to this at all.

01:54:05PM 4 THE COURT: Testify when?

01:54:06PM 5 MR. BUTERMAN: Oh his direct examination about how he

01:54:08PM 6 came up with his housing starts analysis.

01:54:10PM 7 THE COURT: Are you saying he can't testify to that

01:54:12PM 8 topic now?

01:54:13PM 9 MR. BUTERMAN: I thought that --

01:54:16PM 10 THE COURT: In response to what your man said? This

01:54:20PM 11 must really be painful to you all in these objections because

01:54:24PM 12 they're not that good. Objection overruled. He can, in

01:54:28PM 13 fact -- Mr. Dane can ask Mr. Tucker what materials he relied

01:54:34PM 14 upon in coming up with 1.5 million housing starts in 2019, and

01:54:42PM 15 he can say, including I relied on this, this, this and this,

01:54:46PM 16 and if it includes the transcript of the call, that's fine.

01:54:51PM 17 But you're not going -- you don't need to show him the document

01:54:57PM 18 and talk about the text other than to say that's one of the

01:55:03PM 19 things he relied upon; okay?

01:55:05PM 20 MR. DANE: Okay.

01:55:06PM 21 THE COURT: Is there anything else?

01:55:07PM 22 MR. BUTERMAN: There is, but let me just shortchange

01:55:09PM 23 it.

01:55:13PM 24 THE COURT: Do I need this anymore?

01:55:15PM 25 MR. BUTERMAN: No. In fact, if I could get it back.



01:55:21PM 1 Your Honor, the other issue is Steves plans to  
01:55:31PM 2 introduce some deposition testimony of Mr. Fancher. This isn't  
01:55:37PM 3 excerpts, as far as I'm aware of, that they had designated,  
01:55:40PM 4 and, as far as I understand, this is not anything that Mr.  
01:55:45PM 5 Tucker mentions in his report that he relied upon.

01:55:48PM 6 Mr. Fancher was here. He testified at trial. He  
01:55:51PM 7 certainly did not testify about these topics, and it seems as  
01:55:55PM 8 if what they're really trying to do is impeach Mr. Kaplan with  
01:56:01PM 9 something that Mr. Fancher said during his deposition. If  
01:56:06PM 10 that's what they wanted to do, they should have done it when  
01:56:10PM 11 Mr. Kaplan was testifying rather than now when Mr. Tucker is  
01:56:14PM 12 here.

01:56:16PM 13 MR. DANE: Your Honor --

01:56:19PM 14 THE COURT: What is it? Can somebody share it with  
01:56:22PM 15 me? It's another one of those things that's so secret, I can't  
01:56:27PM 16 see it?

01:56:28PM 17 MR. BUTERMAN: No, Your Honor. I apologize.

01:56:32PM 18 MR. DANE: Your Honor, the relevant testimony appears  
01:56:34PM 19 on page 388, lines ten through 19.

01:56:56PM 20 THE COURT: What are you going to do with this?

01:56:59PM 21 MR. DANE: I was just going to ask him if, in forming  
01:57:02PM 22 his opinion as to what were reasonable housing starts  
01:57:05PM 23 estimates, he had relied upon testimony from any Jeld-Wen  
01:57:09PM 24 representatives.

01:57:10PM 25 THE COURT: And his answer is?

01:57:12PM 1 MR. DANE: His answer will be, yes, Mr. Fancher, and  
01:57:14PM 2 I provided this to counsel --

01:57:16PM 3 THE COURT: This is another thing that experts can  
01:57:19PM 4 rely on, is deposition testimony. We all agree on that.

01:57:22PM 5 MR. BUTERMAN: Yes, Your Honor, but as far as I  
01:57:25PM 6 understand, he does not say that anywhere in his report. He  
01:57:28PM 7 doesn't cite to Mr. Fancher's deposition testimony as something  
01:57:33PM 8 he looked at in coming up with the reasonableness of his  
01:57:36PM 9 figures.

01:57:36PM 10 THE COURT: So this is a Rule 26 objection.

01:57:38PM 11 MR. BUTERMAN: Yes, Your Honor.

01:57:39PM 12 THE COURT: Where in his report does he cite Mr.  
01:57:41PM 13 Fancher's testimony?

01:57:43PM 14 MR. DANE: He doesn't cite to it in his report, Your  
01:57:45PM 15 Honor. This was something that Mr. Tucker reviewed after his  
01:57:49PM 16 last report was served.

01:57:51PM 17 THE COURT: After what?

01:57:52PM 18 MR. DANE: After his last report was served.

01:57:55PM 19 THE COURT: Objection sustained. You can't use that.  
01:57:59PM 20 Are we ready for the jury?

01:58:01PM 21 MR. BUTERMAN: Yes, Your Honor.

01:58:04PM 22 THE COURT: Mr. Dane, are we ready for the jury?

01:58:06PM 23 MR. DANE: Yes, Your Honor.

01:58:08PM 24 THE COURT: Bring them in, please, Mr. Robertson.  
01:58:20PM 25 It's been a long day, hasn't it?

01:58:25PM 1 MS. MALTAS: Long month.

01:58:36PM 2 THE COURT: Me, too.

01:58:42PM 3

01:58:42PM 4 (Jury in.)

01:58:42PM 5 (Discussion off the record.)

01:59:49PM 6

01:59:49PM 7 THE COURT: All right, Mr. Tucker, come up, please.

01:59:52PM 8 I believe, Mr. Tucker, you were not excused, so you are still

01:59:56PM 9 under the same oath that you took when you first testified,

01:59:59PM 10 sir. If you'd go ahead and have a seat.

02:00:07PM 11 MR. DANE: Your Honor, if I can bring up two

02:00:09PM 12 documents I may use with Mr. Tucker.

02:00:11PM 13 THE COURT: All right.

02:00:12PM 14

02:00:12PM 15 **AVRAM TUCKER,**

02:00:12PM 16 a witness, recalled at the instance of the plaintiff, having

02:00:12PM 17 been previously duly sworn, testified as follows:

02:00:12PM 18 DIRECT EXAMINATION

02:00:16PM 19 BY MR. DANE:

02:00:16PM 20 Q Welcome back, Mr. Tucker.

02:00:35PM 21 A Thank you.

02:00:36PM 22 Q Now, your opinion in this case, sir, is based on a number

02:00:40PM 23 of assumptions of facts that you understand that the jury will

02:00:47PM 24 ultimately be deciding; is that right?

02:00:49PM 25 A Yes.

Tucker - Direct

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02:00:50PM 1 Q Such as with regards to the issue of the availability of  
02:00:53PM 2 alternative sources of door skins for Steves when the supply  
02:00:57PM 3 agreement with Jeld-Wen terminates in 2021?

02:00:59PM 4 A That's correct.

02:01:00PM 5 Q Now, did you hear Mr. Kaplan testify this morning that it  
02:01:03PM 6 is important for an expert to review the evidence underlying  
02:01:07PM 7 the reasonableness of assumptions he's asked to make?

02:01:11PM 8 A Yes, he said that.

02:01:12PM 9 Q Did you do that here?

02:01:13PM 10 A Absolutely.

02:01:14PM 11 Q And what did you do?

02:01:16PM 12 A I spent a lot of time reviewing documents. I reviewed  
02:01:21PM 13 depositions, I reviewed -- discussed this with Mr. Sam Steves,  
02:01:26PM 14 and I also listened to the trial.

02:01:28PM 15 Q And did you form a conclusion as to whether the  
02:01:31PM 16 assumptions that you were asked to form were reasonable?

02:01:35PM 17 A I believe they were reasonable --

02:01:37PM 18 MR. BUTERMAN: Objection, Your Honor.

02:01:39PM 19 THE COURT: And the objection is?

02:01:41PM 20 MR. BUTERMAN: I think this is going into the area  
02:01:43PM 21 that we talked about this morning.

02:01:47PM 22 THE COURT: I think that Dr. Kaplan was permitted to  
02:01:52PM 23 say you had to do this and he didn't do it, so the question is  
02:01:55PM 24 whether he did it. He's not going to vouch for any of the  
02:01:59PM 25 evidence. I'm going to give the jury a specific instruction on

Tucker - Direct

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02:02:02PM 1 that. Objection overruled.

02:02:04PM 2 MR. BUTERMAN: Okay.

02:02:05PM 3 Q Did you form a conclusion, Mr. Tucker, as to whether the  
02:02:08PM 4 assumption -- try that again. Did you form a conclusion as to  
02:02:14PM 5 whether the assumptions that you had been asked to make in  
02:02:19PM 6 forming your opinions in this case were reasonable?

02:02:21PM 7 A They were reasonable assumptions for the purposes of  
02:02:23PM 8 measuring and estimating the damages that I claimed.

02:02:27PM 9 THE COURT: Ladies and gentlemen, he's entitled to  
02:02:30PM 10 assume -- to attest, for his purposes, whether the assumptions  
02:02:34PM 11 are reasonable, because that's something he needs to do to do  
02:02:39PM 12 what he did. Whether they are, in fact, reasonable is your  
02:02:45PM 13 job, and what he has to say about whether they're reasonable or  
02:02:48PM 14 not is not evidence of the reasonableness. It's evidence only  
02:02:51PM 15 that he did what he's supposed to do in the method that he  
02:02:56PM 16 followed. Is that a satisfactory instruction? All right.

02:03:04PM 17 Q Let me ask you now, Mr. Tucker, a little bit about your  
02:03:08PM 18 lost profits opinion and some of the estimates that you made in  
02:03:11PM 19 arriving at that opinion. I want to start with the issue of  
02:03:16PM 20 housing starts.

02:03:17PM 21 A Yes.

02:03:17PM 22 Q Did you hear Mr. Kaplan testify that he considered those  
02:03:22PM 23 to be speculative?

02:03:23PM 24 A I did.

02:03:24PM 25 Q Do you consider those estimates to be speculative?

Tucker - Direct

2411

02:03:26PM 1 A No. The use of housing starts -- excuse me.

02:03:30PM 2 Q Did you rely upon any information from Masonite in support  
02:03:39PM 3 of your estimates of 1.5 million housing units per year growth?

02:03:44PM 4 A I did.

02:03:45PM 5 Q And what specifically did you rely on?

02:03:48PM 6 A In February of 2017, Masonite had what we call an earnings  
02:03:52PM 7 call where they tell the public and investors information about  
02:03:55PM 8 their company, and in that document, they identified housing  
02:04:00PM 9 starts would get to 1.5 million by 2019, which is earlier than  
02:04:05PM 10 I estimated. I thought it might take a little bit longer, so I  
02:04:10PM 11 was conservative in relation to that Masonite statement.

02:04:13PM 12 Q Turning from the issue of housing starts to door sales,  
02:04:17PM 13 did you hear Mr. Kaplan's testimony about the projected  
02:04:20PM 14 revenues that you had estimated?

02:04:22PM 15 A Yes.

02:04:23PM 16 Q And if I can ask you to pull out work paper 12D(S) which  
02:04:30PM 17 is in front of you.

02:04:32PM 18 MR. DANE: And, Phil, if we can put that up on the  
02:04:35PM 19 screen.

02:04:38PM 20 Q Do you recall him testifying to the figures that are  
02:04:40PM 21 reflected in this work paper that you prepared?

02:04:43PM 22 A Yes.

02:04:44PM 23 Q And so it's clear to the jury, in the left column we see  
02:04:55PM 24 housing starts, so that was one of the variables that entered  
02:04:58PM 25 into your projections of revenues; correct?

Tucker - Direct

2412

02:05:00PM 1 A Yes.

02:05:00PM 2 Q And the housing starts, that would give you some way to  
02:05:04PM 3 estimate the units of doors that would be sold; is that right?

02:05:07PM 4 A Yes, since the units match generally with the Steves'  
02:05:11PM 5 sales of doors.

02:05:11PM 6 Q Then how did you get from that to the revenue figures that  
02:05:14PM 7 are reflected in the third column?

02:05:16PM 8 A Basically what I did was by starting what Steves had  
02:05:20PM 9 actually sold in recent years, the number of units, I increased  
02:05:23PM 10 them by five percent based on the housing start information per  
02:05:29PM 11 year until 2022, at which time I assumed no further increases  
02:05:33PM 12 in the units of sales of Steves. And then based on an estimate  
02:05:37PM 13 of sales prices, that's how I generated the sales revenue.

02:05:40PM 14 Q And did you hear Mr. Kaplan's testimony that he considered  
02:05:44PM 15 these revenue figures as well to be unreliable?

02:05:47PM 16 A I did.

02:05:47PM 17 Q Do you consider your revenue projections to be reliable?

02:05:51PM 18 A I do.

02:05:52PM 19 Q And can you explain why.

02:05:54PM 20 A They're based on a reasonable estimate of housing starts,  
02:05:58PM 21 they're based on the prices that Steves was selling doors for  
02:06:02PM 22 in most recent years. It includes small increases, basically  
02:06:06PM 23 for inflation, and also if you take a look at Steves' revenue  
02:06:11PM 24 over the past ten years compared to the revenue for the next  
02:06:15PM 25 ten years, it's quite reasonable because the percentage

Tucker - Direct

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02:06:19PM 1 increase -- can I draw on this?

02:06:21PM 2 THE COURT: Yes.

02:06:25PM 3 A Thank you. If you look at the revenue growth from 2007  
02:06:33PM 4 before the recession of 116 million and you see that it grew to  
02:06:39PM 5 \$198 million by 2016, that's about a 70 percent increase.

02:06:46PM 6 In my estimation, my projections, which are shown in the  
02:06:51PM 7 next column, I show it going from 216 million, which is similar  
02:06:59PM 8 to the recent sales, to 321 million. That's less growth than  
02:07:05PM 9 Steves actually incurred during the last ten years. So I think  
02:07:09PM 10 they're reasonable estimates of what the sales will be in the  
02:07:11PM 11 future.

02:07:13PM 12 Q And, again, to be clear on this, the figure that ends up  
02:07:17PM 13 being the final revenue figure for 2027 of \$321 million, is  
02:07:24PM 14 that the figure that you used for purposes of calculating the  
02:07:31PM 15 lost profits that should be awarded in this case?

02:07:33PM 16 A It was part of the calculation, but, remember, once I  
02:07:37PM 17 determined the profits on the 321 million, I then discounted it  
02:07:42PM 18 every year by 15 percent. So the amount I actually claimed is  
02:07:47PM 19 substantially less than the profits on the 321 million.

02:07:51PM 20 Q Did you also hear Mr. Kaplan testify about an adjustment  
02:07:55PM 21 you made to your lost profit calculation with regard to cost of  
02:07:59PM 22 sales to take into account information that you had reviewed  
02:08:03PM 23 for the 14-month period ending February 2017?

02:08:06PM 24 A Yes.

02:08:07PM 25 Q And why did you make that adjustment?



Tucker - Direct

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02:08:09PM 1 A So as I was doing my work, after I submitted my first  
02:08:14PM 2 report, or one of my reports, Steves provided additional  
02:08:18PM 3 information which was information I didn't have when I first  
02:08:21PM 4 did my report. It was audited financial statements for the  
02:08:25PM 5 14 months ending February 2017.

02:08:28PM 6 When you are trying to come up with a reasonable estimate  
02:08:30PM 7 of damages or projections for the future, it's really important  
02:08:33PM 8 to use the most current information that you had. So I went  
02:08:37PM 9 ahead and used that and adjusted my damages based on the new  
02:08:41PM 10 information.

02:08:42PM 11 Q And you did that even though it lowered the total amount  
02:08:45PM 12 of your lost profits; correct?

02:08:46PM 13 A Yes. I wanted to get whatever was the most reasonable  
02:08:49PM 14 estimate at the time of trial.

02:08:51PM 15 Q And your lost profits analysis was based upon a  
02:08:56PM 16 hypothetical scenario that the CMI merger did not occur;  
02:09:00PM 17 correct?

02:09:00PM 18 A That's correct.

02:09:01PM 19 Q And that was the basis for your backing out the damages  
02:09:05PM 20 that you calculated that Steves has contended, at least, that  
02:09:09PM 21 it has suffered from Jeld-Wen's conduct since the merger;  
02:09:12PM 22 right?

02:09:12PM 23 A Yes.

02:09:12PM 24 Q But you didn't back out the costs related to Towanda, the  
02:09:17PM 25 plant that Jeld-Wen had acquired from CraftMaster, in

Tucker - Direct

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02:09:20PM 1 estimating Steves' costs of obtaining door skins for purposes  
02:09:23PM 2 of your lost profits calculation; correct?

02:09:25PM 3 A That's correct.

02:09:26PM 4 Q Why not?

02:09:26PM 5 A Because I thought that the actual costs in most recent  
02:09:32PM 6 years was the best base to project the future, because the  
02:09:37PM 7 prices that were paid by Steves were set in the long-term  
02:09:41PM 8 supply agreement in 2012, before the merger, and when there was  
02:09:45PM 9 competition.

02:09:47PM 10 Q Lastly, sir, you heard Mr. Kaplan testify and criticize  
02:09:52PM 11 you for offsetting your lost profit damage calculations by the  
02:09:56PM 12 amounts that Steves could have obtained from selling all or  
02:10:00PM 13 parts of its business?

02:10:01PM 14 A Yes.

02:10:01PM 15 Q And is it true that you did not discount your damages by  
02:10:06PM 16 that amount?

02:10:06PM 17 A Yes.

02:10:07PM 18 Q Why not?

02:10:07PM 19 A My lost profits were limited to lost profits. I didn't  
02:10:12PM 20 claim the higher value of Steves which would include other  
02:10:16PM 21 things besides lost profits for a set period of years. If I  
02:10:21PM 22 had made a claim based on the overall value of Steves, then I  
02:10:24PM 23 would have deducted anything that they could get now, but it's  
02:10:27PM 24 not a necessary adjustment against lost profits for a certain  
02:10:30PM 25 number of years.

Tucker - Direct

2416

02:10:31PM 1 Q And, finally, Mr. Tucker, do you agree with Mr. Kaplan's  
02:10:35PM 2 view, as he testified to this morning, that any projection of  
02:10:39PM 3 lost profits in this case would be inherently speculative?

02:10:43PM 4 A I do not.

02:10:44PM 5 Q Why not?

02:10:45PM 6 A When you're preparing a claim, you're put in a position of  
02:10:49PM 7 trying to figure out what would have happened in the absence of  
02:10:52PM 8 someone's conduct, in this case what would have happened to  
02:10:55PM 9 Steves in the absence of conduct that Steves claims was  
02:10:58PM 10 improper by Jeld-Wen.

02:10:59PM 11 When you do, you have to make a reasonable projection, and  
02:11:03PM 12 that, over the last 40 years, is what I've seen, I've done, and  
02:11:07PM 13 all experts have done. You make reasonable projections based  
02:11:10PM 14 on reasonable assumptions, and that's what I believe I've done  
02:11:14PM 15 in this case.

02:11:15PM 16 MR. DANE: Thank you very much, Mr. Tucker.

02:11:18PM 17 THE COURT: Mr. Buterman?

02:11:19PM 18 MR. BUTERMAN: Thank you, Your Honor.

02:11:21PM 19

02:11:21PM 20 CROSS-EXAMINATION

02:11:23PM 21 BY MR. BUTERMAN:

02:11:23PM 22 Q Good afternoon, Mr. Tucker.

02:11:40PM 23 A Good afternoon.

02:11:41PM 24 Q Now, I believe you testified a few moments ago that with  
02:11:47PM 25 respect to Steves' revenues, you believe that your ultimate

02:11:53PM 1 calculation of Steves' growth from 2017 to 2029 is reasonable  
02:12:01PM 2 because you looked back at what happened to Steves' revenues  
02:12:06PM 3 from 2007 to 2016; is that correct?

02:12:10PM 4 A That was part of the reason I determined it was  
02:12:12PM 5 reasonable.

02:12:12PM 6 Q And what you said a moment ago was that if you looked at  
02:12:15PM 7 the revenues in 2007 and compared them to 2016, and you look at  
02:12:20PM 8 the growth there, well, then, that is actually a higher  
02:12:27PM 9 percentage growth than you estimate will occur by 2029; is that  
02:12:33PM 10 correct?

02:12:33PM 11 A From now until 2029, that's correct.

02:12:36PM 12 Q And if you look at the first set of numbers, the 2007 to  
02:12:46PM 13 2016, you see that actually in the first several years, Steves'  
02:12:49PM 14 revenues were decreasing; correct, sir?

02:12:52PM 15 A Correct.

02:12:52PM 16 Q And Steves' revenues only started to increase after, or  
02:12:58PM 17 increase even a little -- or more than a trivial amount after  
02:13:03PM 18 Jeld-Wen acquired CMI in 2012; do you see that, sir?

02:13:07PM 19 A That's not correct. They began to increase in 2010. It  
02:13:11PM 20 increased in 2011, then 2012, and then again in 2013.

02:13:16PM 21 Q Where is the growth from, sir?

02:13:19PM 22 A When you say the growth from, I --

02:13:21PM 23 Q I mean, you said that the numbers went up from 116 million  
02:13:26PM 24 to 198 million, sir, but, actually, the numbers only even  
02:13:32PM 25 started to get close to 116 million again after the

02:13:36PM 1 acquisition; is that correct? In 2013, the number is at 113  
02:13:42PM 2 million?

02:13:42PM 3 MR. DANE: Your Honor, may I approach?

02:13:46PM 4  
02:13:46PM 5 (Discussion at sidebar as follows:)

02:13:53PM 6  
02:13:53PM 7 MR. DANE: Your Honor, he can ask the questions about  
02:13:57PM 8 what were the profits, how did profits change over the years,  
02:14:02PM 9 but linking it to the acquisition is exactly the *Hanover Shoe*  
02:14:06PM 10 issue. He's trying to create the inference that Steves had  
02:14:09PM 11 benefited from the merger by increased profits, and that is  
02:14:13PM 12 what you have said a dozen times in this case they cannot do,  
02:14:16PM 13 and they try to do it every chance they get.

02:14:17PM 14 MR. BUTERMAN: This is revenue. I don't even know  
02:14:19PM 15 where you are getting that. It has nothing to do with it.  
02:14:21PM 16 What I'm trying to establish --

02:14:23PM 17 THE COURT: Ask your question in terms of time, not  
02:14:25PM 18 in terms of reference to the merger.

02:14:28PM 19 MR. BUTERMAN: Okay. That's fine.

02:14:35PM 20  
02:14:35PM 21 (End of sidebar discussion.)

02:14:37PM 22  
02:14:37PM 23 Q So, Mr. Tucker, you would agree with me that from 2013 to  
02:14:43PM 24 2016, that's where you see the increase that you speak of?

02:14:49PM 25 A No, sir. I talked about the increase prior to the

02:14:53PM 1 recession and the housing crisis in 2007 all the way to 2016.

02:14:58PM 2 It is true that you also see an increase starting in 2010 and

02:15:05PM 3 '11, but I didn't think it would be appropriate to use that

02:15:07PM 4 percentage, because that was impacted by the housing crisis and

02:15:10PM 5 the recession.

02:15:11PM 6 Q So let's just see if we can cut through this. Your

02:15:16PM 7 2007-to-2016 number shows certain years where revenue is

02:15:22PM 8 decreasing; correct, sir?

02:15:23PM 9 A Yes.

02:15:23PM 10 Q And then starting in 2011, we see the number having

02:15:33PM 11 increased from 2010; correct, sir?

02:15:35PM 12 A Yes.

02:15:35PM 13 Q And then you see more significant increases moving

02:15:41PM 14 forward?

02:15:41PM 15 A That's correct.

02:15:42PM 16 Q Now, if you look at your projected revenue for the years

02:15:49PM 17 of 2017 on, you do not have any years where revenue is

02:15:57PM 18 declining; correct, sir?

02:15:58PM 19 A That's correct. Would you like --

02:16:01PM 20 MR. BUTERMAN: Actually --

02:16:02PM 21 THE COURT: Wait just a minute. That's correct,

02:16:05PM 22 period.

02:16:06PM 23 MR. BUTERMAN: Thank you.

02:16:06PM 24 Q And your assumption is that revenue is going to increase

02:16:10PM 25 year over year; is that correct, sir?

Tucker - Cross

2420

02:16:11PM 1 A Yes, sir.

02:16:13PM 2 Q Okay. Now, you mentioned --

02:16:24PM 3 MR. BUTERMAN: Actually, Gail, can we put up Mr.

02:16:27PM 4 Tucker's schedule 12B(S).

02:16:39PM 5 Q Mr. Tucker, this is your calculation of Steves' lost

02:16:45PM 6 profits; correct, sir?

02:16:46PM 7 A Yes.

02:16:47PM 8 Q Let me just ask you one question to begin with.

02:16:51PM 9 A If I could clarify, this is one of the many schedules.

02:16:56PM 10 Q If you look at the first row here, that's the projected

02:17:02PM 11 housing starts; correct, sir?

02:17:03PM 12 A Yes.

02:17:04PM 13 Q And to be clear, the numbers that appear from 2017 to

02:17:14PM 14 2022, those are all estimates that you have put together;

02:17:18PM 15 correct, sir?

02:17:18PM 16 A Yes, based on my review of the evidence and my experience.

02:17:21PM 17 Q Yes. And, sir, just picking 2017, since that's the most

02:17:29PM 18 recent year, you didn't get it right, did you? Housing starts

02:17:36PM 19 were actually lower than what you estimated even for 2017, sir,

02:17:41PM 20 on the report that you put together in August of 2017; correct,

02:17:46PM 21 sir?

02:17:46PM 22 A I don't recall that specifically, but I don't recall

02:17:49PM 23 anything that caused me to think that five percent, to get back

02:17:53PM 24 to the long-term average of 1.5 million, was unreasonable.

02:17:58PM 25 Q Sir, are you testifying that you believe that housing

02:18:00PM 1 starts were 1.232 in 2017?

02:18:04PM 2 A No, I didn't say that.

02:18:05PM 3 Q You know that they're lower; correct, sir?

02:18:07PM 4 A I don't recall the specific amount.

02:18:08PM 5 Q Do you recall whether it was higher or lower?

02:18:10PM 6 A I don't actually recall. I do recall studying this to see

02:18:14PM 7 that I didn't think it would impact my estimate of five percent

02:18:17PM 8 per year.

02:18:17PM 9 Q Did you consider -- let me ask you this question: If this

02:18:20PM 10 number is off, the 1,232, that number -- did you consider

02:18:24PM 11 readjusting your numbers moving forward?

02:18:27PM 12 A I did not, although it would make a mathematical

02:18:29PM 13 difference --

02:18:30PM 14 Q When you say a mathematical difference, sir, what you

02:18:33PM 15 actually mean is it would decrease Steves' future lost profits

02:18:37PM 16 calculations; correct, sir?

02:18:38PM 17 A Only for that particular year --

02:18:40PM 18 Q I'm sorry, sir. If you could just answer my question.

02:18:43PM 19 And what you are saying is that it would decrease the future

02:18:47PM 20 lost profits -- excuse me, your calculations for 2017, and if

02:18:50PM 21 you readjust it based on that number, that would impact the

02:18:54PM 22 subsequent years, would it not, sir?

02:18:56PM 23 A It would, but it wouldn't be appropriate to do so.

02:19:00PM 24 Q That's your opinion, sir?

02:19:02PM 25 A Yes, sir.



02:19:02PM 1 Q Now, again, sir, you testified today that you believed  
02:19:20PM 2 your lost profits calculations were conservative; is that  
02:19:25PM 3 correct?

02:19:25PM 4 A I would say it's a reasonable projection; if anything on  
02:19:29PM 5 the conservative side, but a reasonable projection.

02:19:32PM 6 Q And you believe that the projection that you had made  
02:19:34PM 7 initially, which was \$13 million higher at the top end, was  
02:19:41PM 8 also a reasonable conservative estimate; correct, sir?

02:19:44PM 9 A It was based on the information available at the time.

02:19:46PM 10 Q And what happens was between the time of your first  
02:19:50PM 11 report, the first lost profits calculation, and your  
02:19:52PM 12 supplemental calculation, you received, I believe you  
02:19:56PM 13 testified, these audited financial information?

02:19:58PM 14 A Correct.

02:19:59PM 15 Q And that caused your lost profits calculations at the top  
02:20:05PM 16 end to go down 13 million?

02:20:06PM 17 A I think that's the number, correct.

02:20:09PM 18 Q Sir, if you were to get more information, that could cause  
02:20:12PM 19 your lost profits calculations to go down even more  
02:20:15PM 20 significantly; correct?

02:20:16PM 21 A It could go down or up, depending on what the new  
02:20:19PM 22 information is.

02:20:19PM 23 Q And you just don't know, do you, sir?

02:20:22PM 24 A Of course not. I base it on what I have at the time.

02:20:25PM 25 Q Now, sir, about your lost profits calculations -- and

02:20:30PM 1 there were some questions about what you included and did not  
02:20:33PM 2 include. If we can look at your subtotal, this is the line  
02:20:43PM 3 that says subtotal pretax before executive comp all the way  
02:20:48PM 4 down.

02:20:49PM 5 MR. BUTERMAN: Gail, can you just blow up that line  
02:20:52PM 6 across.

02:21:05PM 7 Q I just want to make sure I understand what this includes,  
02:21:09PM 8 sir. So you are estimating lost profits for Steves out through  
02:21:20PM 9 2029; correct, sir?

02:21:21PM 10 A Correct, for the period 2021 to 2029.

02:21:26PM 11 Q Sir, did you include the cost of capital improvements in  
02:21:34PM 12 figuring out your lost profits analysis?

02:21:37PM 13 A Cost of capital of Steves?

02:21:40PM 14 Q Yeah. For instance, how much money they have to invest  
02:21:43PM 15 into keeping their machinery up to date, how much money they  
02:21:47PM 16 invest in research and development, or in things like, you  
02:21:52PM 17 know, purchasing equipment or plants?

02:21:55PM 18 A No. It wasn't necessary to do that.

02:21:58PM 19 Q So your assumption, sir, is that Steves will continue to  
02:22:05PM 20 make profits and increase profits all the way through 2029  
02:22:09PM 21 without investing one penny in things like keeping its  
02:22:13PM 22 factories up to date, research and development, and all of  
02:22:20PM 23 their equipment running?

02:22:21PM 24 A That's correct, because I didn't claim the additional  
02:22:24PM 25 amounts that they've incurred. That's a fixed cost you don't

02:22:28PM 1 typically include in a lost profits calculation.

02:22:30PM 2 Q Sir, you've studied Steves' audited financials, have you  
02:22:34PM 3 not, sir?

02:22:34PM 4 A I have.

02:22:35PM 5 Q You have; right?

02:22:36PM 6 A Yes.

02:22:37PM 7 Q And you are aware that actually Steves spent, as of  
02:22:45PM 8 December 31st, 2015, over \$3 million on those very things;  
02:22:51PM 9 correct, sir?

02:22:52PM 10 A Sir, I took all of that into consideration in the estimate  
02:22:55PM 11 of costs. The costs have what we call depreciation costs, and  
02:22:59PM 12 that's the amount that the company incurs to pay for those  
02:23:02PM 13 things. So I've absolutely taken all of those things into  
02:23:06PM 14 consideration, not separately, but because I considered all of  
02:23:09PM 15 their costs which include the depreciation of the capital  
02:23:13PM 16 assets.

02:23:14PM 17 Q Only in the one year, sir, that you depreciated over the  
02:23:17PM 18 time?

02:23:17PM 19 A No.

02:23:18PM 20 Q Sir, you did not --

02:23:20PM 21 THE COURT: He said no. Wait a minute. Do you want  
02:23:26PM 22 to ask him another question?

02:23:28PM 23 MR. BUTERMAN: Yes, Your Honor.

02:23:28PM 24 Q You did not include the three-plus million dollars that  
02:23:32PM 25 Steves has invested in recent years each year in figuring out

02:23:36PM 1 those numbers?

02:23:37PM 2 A I did. It's included in the depreciation number, because  
02:23:40PM 3 I accepted all of their costs as a deduction from sales. In  
02:23:44PM 4 those costs includes depreciation which is how a company  
02:23:47PM 5 expenses their investment in capital like the \$3 million that  
02:23:51PM 6 you are talking about.

02:23:52PM 7 Q And, sir, did the number go up year over year?

02:23:55PM 8 A It went up as the revenue and costs that I estimated went  
02:23:58PM 9 up --

02:23:59PM 10 Q Just so we're clear, sir --

02:24:02PM 11 THE COURT: You are cutting him off --

02:24:04PM 12 MR. BUTERMAN: Sorry.

02:24:04PM 13 THE COURT: Give him a chance, and he'll give you a  
02:24:09PM 14 chance.

02:24:12PM 15 Q Just so we're clear, sir, your testimony here today is  
02:24:15PM 16 that you accounted for the \$3 million that Steves expended in  
02:24:20PM 17 capital costs for each year all the way out through 2029?

02:24:25PM 18 A I accounted for all capital costs through the depreciation  
02:24:29PM 19 that I included in the costs that reduced my sales to get to  
02:24:33PM 20 lost profits, yes.

02:24:33PM 21 Q Now, sir, Mr. Dane had asked you a bit about your  
02:24:42PM 22 inclusion of Towanda in your calculations.

02:24:46PM 23 A Yes.

02:24:47PM 24 Q To be clear, you included Towanda in all of your  
02:24:50PM 25 calculations; correct, sir?

02:24:52PM 1 A To the extent it was relevant, yes.

02:24:54PM 2 Q Let's just be clear. You have three measures of damages:

02:24:57PM 3 You have damages relating to overcharges, you have damages

02:25:01PM 4 relating to defects, and then you have the future lost profits;

02:25:04PM 5 correct, sir?

02:25:04PM 6 A Correct.

02:25:06PM 7 Q And Mr. Tucker actually -- excuse me, Mr. Kaplan. You

02:25:17PM 8 heard Mr. Kaplan testify that your overcharge damages included

02:25:21PM 9 Towanda; correct, sir?

02:25:23PM 10 A Included Towanda as a cost of Jeld-Wen, yes.

02:25:27PM 11 Q I'm sorry. Maybe we're missing each other here. When you

02:25:31PM 12 calculated the overcharge damages, you included overcharges

02:25:34PM 13 related to Towanda; correct, sir?

02:25:36PM 14 A Well, indirectly if you mean I considered all of

02:25:39PM 15 Jeld-Wen's key input costs for all of their plants including

02:25:43PM 16 Towanda, that's correct.

02:25:43PM 17 Q And when you did that, Mr. Kaplan criticized you for doing

02:25:49PM 18 that; correct, sir?

02:25:50PM 19 A I don't know if it was a criticism. He pointed it out.

02:25:54PM 20 Q And your response to that was to say that his critique

02:25:57PM 21 appeared to confuse the antitrust aspects of this case with

02:26:02PM 22 Steves' claims that Jeld-Wen breached the supply agreement;

02:26:05PM 23 correct, sir?

02:26:05PM 24 A That had to do with responding to one particular thing

02:26:08PM 25 that Mr. Kaplan had said.

02:26:09PM 1 Q And that was with respect to the overcharges; correct,  
02:26:12PM 2 sir?

02:26:12PM 3 A With respect to one part of his criticism about Towanda  
02:26:15PM 4 and the overcharges.

02:26:17PM 5 Q And to be clear, sir, in your defects calculations as  
02:26:24PM 6 well, you have calculated damages that include defective door  
02:26:29PM 7 skins from Towanda; correct, sir?

02:26:31PM 8 A If there were door skins that came from Towanda, that's  
02:26:35PM 9 correct, that were defective.

02:26:36PM 10 Q Are you saying that you don't know that there were?

02:26:39PM 11 A I believe there were.

02:26:40PM 12 THE COURT: You're getting pretty far away from the  
02:26:42PM 13 direct examination, Mr. Buterman. You are going back into  
02:26:45PM 14 plowing ground maybe you wanted to cover earlier but didn't.  
02:26:49PM 15 So let's confine it to what he was asked on direct.

02:26:56PM 16 MR. BUTERMAN: Okay, Your Honor.

02:26:59PM 17 THE COURT: We're not starting all over.

02:27:01PM 18 MR. BUTERMAN: I'm not suggesting it, Your Honor.

02:27:03PM 19 Mr. Dane had just talked about Towanda.

02:27:05PM 20 Q Let me just make sure that we're completely in agreement,  
02:27:08PM 21 sir.

02:27:08PM 22 THE COURT: He already said that. We're not going  
02:27:11PM 23 through that again. We did the same thing with the preceding  
02:27:13PM 24 line of questions. He answered the thing three times, and I  
02:27:17PM 25 think he was clear, and you were clear each time. So the jury

02:27:20PM 1 is paying attention. This is not one of those army things, you  
02:27:25PM 2 know.

02:27:33PM 3 Q Sir, do any of your damages calculations involve comparing  
02:27:37PM 4 a world in which the CMI acquisition did not occur against a  
02:27:42PM 5 world where -- the actual world?

02:27:45PM 6 A I believe that my lost profits calculations considers a  
02:27:49PM 7 world in which the merger did not occur and there would be  
02:27:53PM 8 competition, yes.

02:27:53PM 9 Q But your overcharging defect claims do not; correct, sir?

02:27:57PM 10 A I think it would result in a similar amount, but it  
02:28:01PM 11 doesn't specifically adjust for those things that you  
02:28:03PM 12 mentioned.

02:28:03PM 13 Q Sir, if you could just answer my question. Your  
02:28:06PM 14 overcharge calculations and defects do not compare a world in  
02:28:09PM 15 which the acquisition occurred versus the but-for world;  
02:28:15PM 16 correct, sir?

02:28:15PM 17 A If you mean by that that I included the cost of Towanda in  
02:28:18PM 18 my calculations, that's correct.

02:28:20PM 19 Q Sir, one last thing. You do agree, though, that Towanda  
02:28:24PM 20 did factor into the cost of sales for 2015 that you used for  
02:28:29PM 21 your lost profits calculations; correct, sir?

02:28:31PM 22 A Yes, I considered all of the costs of Jeld-Wen.

02:28:34PM 23 MR. BUTERMAN: No further questions, Your Honor.

02:28:36PM 24 THE COURT: You don't have anything, do you?

02:28:39PM 25 MR. DANE: Two? Could I have two?

02:28:42PM 1 THE COURT: Come on.

02:28:47PM 2 MR. DANE: Just to clean up, Your Honor.

02:28:49PM 3 THE COURT: Not clean up. You can only address what  
02:28:52PM 4 he's asked.

02:28:53PM 5 MR. DANE: That's what I'm cleaning up, Your Honor.

02:28:53PM 6

02:28:53PM 7 REDIRECT EXAMINATION

02:28:56PM 8 BY MR. DANE:

02:28:56PM 9 Q Now, in your testimony in response to Mr. Buterman, Mr.  
02:28:59PM 10 Tucker, when he asked you about the 2017 housing start  
02:29:04PM 11 information and whether it would be appropriate for you, based  
02:29:07PM 12 upon the fact that the 2017 figures may have been somewhat  
02:29:11PM 13 different than your estimate included in your schedule 12(b)(6)  
02:29:17PM 14 to have readjusted all the future years for housing starts, you  
02:29:21PM 15 testified it would be inappropriate; correct?

02:29:23PM 16 A Yes.

02:29:23PM 17 Q He didn't ask you to explain why. That's the only  
02:29:26PM 18 question I want to ask you. Could you please explain to the  
02:29:30PM 19 jury why that would be inappropriate?

02:29:31PM 20 A Sure. I made an estimate of five percent per year to get  
02:29:34PM 21 to the 1.5 million which, I believe, was a reasonable number,  
02:29:38PM 22 based on my experience, of the long-term average of housing  
02:29:42PM 23 starts and what Masonite reported in its earnings call.

02:29:44PM 24 And the five percent per year didn't mean that every year  
02:29:47PM 25 it would be exactly five percent. I just meant on average. So



02:29:49PM 1 some years it might be higher and some lower, and I felt it was  
02:29:52PM 2 still appropriate to use that as an average.

02:29:55PM 3 MR. DANE: Thank you, Mr. Tucker.

02:29:56PM 4 THE COURT: All right, thank you, sir. You may step  
02:29:58PM 5 down.

02:30:01PM 6 THE WITNESS: Your Honor, Your Honor.

02:30:01PM 7 THE COURT: Anybody have anything to say at this  
02:30:03PM 8 juncture?

02:30:04PM 9 MR. POWELL: We're done with our case, Your Honor.

02:30:07PM 10 THE COURT: All right, ladies and gentlemen, the  
02:30:09PM 11 evidence is in. I have some work to do with the lawyers to get  
02:30:14PM 12 ready for tomorrow morning and the instructions and their  
02:30:17PM 13 arguments and some motions that I need to deal with, so you get  
02:30:21PM 14 the afternoon off. If you'll leave your pads here, we'll see  
02:30:30PM 15 you in the morning at 9:30. Drive carefully, and we'll see you  
02:30:35PM 16 then.

02:30:40PM 17  
02:30:40PM 18 (Jury out.)

02:30:55PM 19  
02:30:55PM 20 THE COURT: We will take 15 minutes because I need to  
02:30:58PM 21 collect some things to get ready for this process that is to  
02:31:01PM 22 follow, and then we will take up the instructions and the  
02:31:04PM 23 verdict form.

02:31:07PM 24  
02:31:07PM 25 (Recess taken.)

1 THE COURT: My objective is to get all the  
03:05:33 2 instructions done as if we were sending everything to the  
03:05:36 3 jury and then hear the motions. And we'll cut out  
03:05:42 4 whatever we're going to cut out. We have revised the  
03:05:59 5 instructions to at least take into account what we did  
03:06:02 6 last night.

03:06:09 7 Now, Steves was to tell me what it wanted  
03:06:11 8 to do about tends to create a monopoly. I haven't  
03:06:21 9 seen anything on that.

03:06:24 10 MR. MACH: Your Honor, I apologize. We had  
03:06:26 11 understood that you had ruled on the issue, although we  
03:06:30 12 objected to --

03:06:31 13 THE COURT: I told you to go back to talk to  
03:06:33 14 Mr. Pomerantz. And I think the last thing I said is to  
03:06:36 15 see if you've spent all this money, you wanted to try to  
03:06:39 16 get that in front of the Fourth Circuit and get it  
03:06:42 17 reversed on that ground. I think that's precisely what I  
03:06:44 18 said.

03:06:44 19 MR. MACH: So we're not withdrawing the  
03:06:47 20 objection, but we don't think it requires further  
03:06:50 21 argument, Your Honor, if that answers your question.

03:06:51 22 THE COURT: No.

03:06:51 23 MR. MACH: Okay.

03:06:51 24 THE COURT: Fish or cut bait is what they call  
03:06:55 25 this time. Do you know that expression?

03:06:56 1 MR. MACH: I think I do.

03:06:58 2 THE COURT: Okay. Fish or cut bait? Which are  
03:07:01 3 you going to do?

03:07:02 4 MR. MACH: So we continue to ask for the  
03:07:04 5 instruction.

03:07:05 6 THE COURT: What's your position?

03:07:06 7 MR. BUTERMAN: Your Honor, our position is that  
03:07:08 8 as of yesterday, there was no evidence. No one had talked  
03:07:12 9 about monopoly. Nothing that came in today changed that.  
03:07:16 10 There's no basis for the jury to even assess the issue,  
03:07:22 11 and we believe that it would be wrong to include it.

03:07:26 12 THE COURT: Anything else?

03:07:28 13 MR. MACH: Not beyond the argument from  
03:07:29 14 yesterday, Your Honor.

03:07:31 15 THE COURT: I don't think this case presents a  
03:07:33 16 case of tend to create a monopoly. And if there ever was  
03:07:38 17 any question as to the proposition, Steves never even  
03:07:45 18 submitted an instruction on it. So they obviously didn't  
03:07:48 19 think it was an issue in the case.

03:07:49 20 The evidence doesn't -- it -- there is evidence in  
03:07:52 21 the case from which somebody, conceptually, could argue  
03:07:57 22 that the merger tended to create a monopoly, but it's not  
03:08:00 23 been tried that way. So it's out.

03:08:03 24 MR. MACH: Thank you, Your Honor.

03:08:21 25 THE COURT: All right. The first place that I

03:08:23 1 recall -- or I believe we have anything to discuss is on  
03:08:26 2 Number 12. You were supposed to submit me proposed  
03:08:29 3 limiting instructions about significance of the cost and  
03:08:35 4 time to build a door skin facility and ability of foreign  
03:08:40 5 supply under the heading of "Evidence Admitted for the  
03:08:44 6 Limited Purposes," and I haven't gotten anything. Has it  
03:08:48 7 been filed and I've missed it?

03:08:56 8 MR. POWELL: Your Honor, I'm sensing that there  
03:08:58 9 may have been confusion between the parties as to who had  
03:09:01 10 the responsibility for drafting that. So I'll take half  
03:09:04 11 the blame if Mr. Buterman will take the other half.

03:09:07 12 MR. BUTERMAN: Regardless of the blame, Your  
03:09:09 13 Honor --

03:09:09 14 THE COURT: You mean to tell me that after you  
03:09:10 15 all left here last night, you didn't sit down and caucus  
03:09:15 16 and talk for hours?

03:09:18 17 MR. POWELL: Obviously, we wish we had, Your  
03:09:20 18 Honor.

03:09:21 19 MR. BUTERMAN: Yeah. Instead, we each went back  
03:09:23 20 and wrote up some more paper to give you, Your Honor,  
03:09:25 21 unfortunately.

03:09:26 22 Your Honor, we will caucus immediately upon exiting  
03:09:30 23 and we will get you something -- can we say within two  
03:09:33 24 hours of --

03:09:34 25 THE COURT: Well, you don't know what time

03:09:35 1 you're leaving yet.

03:09:38 2 MR. BUTERMAN: Fair enough, Your Honor.

03:09:40 3 THE COURT: All right. That's on the to-do  
03:09:40 4 list.

03:09:41 5 MR. BUTERMAN: Yes, Your Honor.

03:09:43 6 THE COURT: All right.

03:09:59 7 The next thing that I have is the -- in Number 19, I  
03:10:06 8 had told you I was going to add something about "nor  
03:10:14 9 does" -- something about making the preceding  
03:10:18 10 instruction -- the first part of the instruction  
03:10:20 11 applicable to demonstrative exhibits. And instead of what  
03:10:24 12 I wrote, Mr. Martecchini actually put in in English,  
03:10:30 13 proper grammar. And so it says now the same instruction  
03:10:32 14 applies for demonstrative exhibits used to aid testimony  
03:10:39 15 in the evidence. Does that suit? Do you have a copy of  
03:10:42 16 that?

03:10:43 17 MR. BUTERMAN: Yes. No objection.

03:10:44 18 THE COURT: Is that okay?

03:10:45 19 MR. POWELL: We're fine with that, Your Honor.

03:10:56 20 THE COURT: All right. Somebody wanted -- and  
03:10:58 21 correctly so, pointed out and put in the right sections of  
03:11:00 22 Section 4 and Section 7. And we've done that in Number  
03:11:06 23 23, indicating what is what.

03:11:11 24 In Number 28, on the second page at the top, we had  
03:11:24 25 put in evidence, in the third line, "in assessing

03:11:30 1 competition," and I think Jeld-Wen asked for "the effect  
03:11:37 2 on competition in the relevant market." And I think  
03:11:39 3 that's a more correct construction, and I put that in.  
03:11:45 4 Everybody all right with that?

03:11:49 5 MR. MACH: Sorry, Your Honor. I'm a little bit  
03:11:51 6 lost. If it's the same language that we discussed  
03:11:54 7 yesterday, then, of course, we don't have additional  
03:11:56 8 objection.

03:11:58 9 THE COURT: Well, I inserted -- I'm not quite  
03:12:01 10 sure how it happened, but on the instruction, it's Number  
03:12:04 11 28, third line from the top of the second page, you'll see  
03:12:09 12 a highlight in your copy. You'll see the highlighted  
03:12:11 13 words "the effect on." I've inserted that at Jeld-Wen's  
03:12:16 14 request. That's what they asked for, and I wrote  
03:12:18 15 apparently -- I either told you I was not going to put  
03:12:23 16 that in or inadvertently left that out, but I think it  
03:12:29 17 belongs in.

03:12:31 18 MR. MACH: We don't have further objection to  
03:12:32 19 that, Your Honor.

03:12:33 20 THE COURT: All right. Next is Number 39,  
03:12:45 21 second page. We have to sort out this futility question.  
03:13:00 22 And Steves wanted to add proposed 40-A.

03:13:07 23 Now, I'm not quite sure why that comes in, why that  
03:13:13 24 would be a proper instruction. Can somebody explain that  
03:13:16 25 to me?

03:13:17 1 MS. ECKSTEIN: Sure, Your Honor. So that goes  
03:13:26 2 to the notice requirement in the contract. And under  
03:13:30 3 Delaware law, we had cited the Reserves Development v. RT  
03:13:34 4 Properties case, which held that notice is not required  
03:13:38 5 where it would be futile. And our position is certainly  
03:13:43 6 with respect to doors, giving notice would have been  
03:13:45 7 futile because of Jeld-Wen's unilateral position not to  
03:13:49 8 pay for doors.

03:13:50 9 I recall Ms. Maltas' argument yesterday that we could  
03:13:53 10 have at least provided notice to get reimbursement on the  
03:13:57 11 door skins. Considering that we're talking about doors  
03:13:59 12 here, that costs between 25 and \$125, as Doug Gartner  
03:14:05 13 testified, and it would have cost upwards of \$500 to  
03:14:09 14 freight them back for the inspection and the notice, and  
03:14:14 15 all we could get back, at most, it was a 4, 5, \$6 door  
03:14:18 16 skin. We think that futility argument still applies.

03:14:26 17 MS. MALTAS: And, Your Honor, as we explained  
03:14:27 18 more fully in the reply in support of the motion for  
03:14:31 19 judgment as a matter of law that we filed this morning, we  
03:14:34 20 don't agree. We don't think that the case that  
03:14:36 21 Ms. Eckstein is citing can be stretched that far.

03:14:40 22 It actually explicitly talked about how it would be  
03:14:43 23 futile in terms of reaching an agreement or a compromise.  
03:14:46 24 It's clear that Steves presented evidence to the jury that  
03:14:49 25 Jeld-Wen was willing to reimburse for defective door skins

03:14:55 1 that were assembled into doors, returned by Steves'  
03:14:59 2 customers. And, therefore, the notice would not have been  
03:15:01 3 futile. The notice would have resulted, in many cases, in  
03:15:05 4 some reimbursement.

03:15:06 5 The only complaint that Steves has is the level of  
03:15:08 6 the reimbursement, which, again, is not Jeld-Wen's  
03:15:11 7 unilateral decision not to reimburse for doors. It's the  
03:15:15 8 actual limitation on recovery provided for and bargained  
03:15:19 9 for in the supply agreement.

03:15:22 10 MS. ECKSTEIN: And the promise to reimburse for  
03:15:24 11 door skins in those situation is, frankly, illusory when  
03:15:29 12 we're talking about the cost of the door.

03:15:31 13 THE COURT: Well, it isn't illusory, I don't  
03:15:35 14 think, within the meaning of the word "at law." It seems  
03:15:47 15 to me as if this whole issue is really -- has to be  
03:15:51 16 resolved by whether or not Steves can proceed with the  
03:15:56 17 claim for a door, to be reimbursed for doors. I think  
03:16:03 18 that's where the rubber meets the road on that  
03:16:07 19 instruction.

03:16:22 20 And this -- and this instruction (b) relates to door  
03:16:26 21 skins, not doors. 3(b) is, "Steves gave notice, thereof,  
03:16:32 22 to Jeld-Wen and an opportunity to inspect those door  
03:16:36 23 skins." And there isn't any futility -- the futility  
03:16:44 24 would apply to what? The door skins that were on the  
03:16:47 25 doors?



03:16:49 1 MS. ECKSTEIN: So to the extent that we have  
03:16:51 2 claims that are purely for door skins, not for doors,  
03:16:53 3 right, door skins that were never made into doors, I'm not  
03:16:57 4 aware that there's a lack of notice argument to those.

03:17:00 5 We've presented VDM reports and the like for those.

03:17:03 6 THE COURT: There's not?

03:17:05 7 MS. MALTAS: No. Our understanding of Steves'  
03:17:07 8 damages claim is that they are seeking reimbursement for  
03:17:10 9 all unpaid VDMs following notice and inspection by  
03:17:13 10 Jeld-Wen. So, no, we are not arguing any notice or  
03:17:16 11 inspection issues for the door skin claims.

03:17:41 12 THE COURT: Well, then this -- see, this is the  
03:17:43 13 problem with the theory of the case that you all have --  
03:17:46 14 and in the proofs. You have aggregated doors and door  
03:17:50 15 skins in your proofs in your damages, and it's -- so it  
03:17:57 16 really ought to be -- (a) ought to be that the shipped  
03:18:02 17 molded door skins to Steves did not meet Jeld-Wen's  
03:18:06 18 specifications or not of a quality satisfactory to Steves  
03:18:16 19 or were not fit for their intended purpose.

03:18:19 20 That's the contract, isn't it?

03:18:21 21 MS. ECKSTEIN: Yes, sir.

03:18:22 22 MS. MALTAS: Yes, Your Honor.

03:18:26 23 THE COURT: So much paper up here.

03:19:12 24 MS. ECKSTEIN: Your Honor --

03:19:13 25 THE COURT: The other thing is what about this

03:19:14 1 clause in 8? There's a fourth provision, and that is,  
03:19:24 2 "and subject to Jeld-Wen's standard written warranty  
03:19:27 3 applicable to the product, paren, the specifications,  
03:19:32 4 closed paren."

03:19:38 5 Now, did anybody testify to what, paren, the  
03:19:41 6 specifications applied to? Does it apply just to  
03:19:46 7 Jeld-Wen's standard written warranty applicable to the  
03:19:48 8 product or does it apply to all of the provisions  
03:19:56 9 beginning with, "Be of a quality satisfactory to Steves"?

03:20:02 10 MS. ECKSTEIN: You're referring to the  
03:20:04 11 specifications with a capital S?

03:20:06 12 THE COURT: I'm talking to 8, paragraph 8. At  
03:20:09 13 the end of that first sentence --

03:20:10 14 MS. ECKSTEIN: Right.

03:20:11 15 THE COURT: -- it says, paren, The, capital S,  
03:20:15 16 specifications. And does specifications mean -- what does  
03:20:21 17 specifications refer to?

03:20:22 18 MS. ECKSTEIN: We understood it --

03:20:23 19 THE COURT: And what is the significance of the  
03:20:25 20 subject to Jeld-Wen's standard written warranty applicable  
03:20:29 21 to the product? So my first question is what does the  
03:20:33 22 parenthetical "the specifications" relate to? What does  
03:20:37 23 it -- does it short form? Does it short form the entire  
03:20:42 24 provision beginning with "of a quality satisfactory to  
03:20:46 25 Steves, comma, meeting Jeld-Wen's specifications, comma,

03:20:50 1 fit for the intended purpose, comma, and subject to  
03:20:54 2 Jeld-Wen's standard written warranty applicable to the  
03:20:57 3 product"?

03:20:58 4 MS. ECKSTEIN: Yes.

03:21:00 5 THE COURT: Or does it apply to only, "and  
03:21:02 6 subject to Jeld-Wen's standard written warranty applicable  
03:21:05 7 to the product"?

03:21:06 8 MS. ECKSTEIN: We read it as applying to all  
03:21:09 9 four.

03:21:10 10 THE COURT: Do you?

03:21:10 11 MS. MALTAS: I have always applied it as just  
03:21:11 12 applying to the latter, to the warranty. I don't think  
03:21:15 13 that Steves put in any testimony or evidence about the  
03:21:17 14 meaning. It's truly ambiguous.

03:21:22 15 MS. ECKSTEIN: Well, whether it -- with respect  
03:21:24 16 to the warranty itself, there is no evidence in the case  
03:21:27 17 about a warranty. We're not aware of one.

03:21:30 18 MS. MALTAS: My understanding is that Jeld-Wen  
03:21:31 19 provided a written warranty to Steves through the course  
03:21:34 20 of the relationship, and Steves rejected it.

03:21:37 21 THE COURT: Where is it?

03:21:38 22 MS. MALTAS: Steves didn't introduce any  
03:21:40 23 evidence about the warranty in the case.

03:21:42 24 MS. ECKSTEIN: They haven't either. We're not  
03:21:43 25 aware of it.

03:21:45 1 THE COURT: That's fine. But, you know, you  
03:21:46 2 have a contract here, and that's a term of the contract,  
03:21:51 3 and we need to make sure the instructions match the  
03:21:57 4 contract.

03:22:00 5 Now, so I'm taking it that there is no contention by  
03:22:03 6 Steves that the breach of contract as to Section 8  
03:22:12 7 included the breach of Jeld-Wen's standard written  
03:22:18 8 warranty applicable to the product?

03:22:22 9 MS. ECKSTEIN: Right. It's the entire -- that  
03:22:23 10 entire clause, which would include that phrase.

03:22:27 11 THE COURT: No. But the point is when you're --  
03:22:30 12 you all told me yesterday that this is a situation where  
03:22:36 13 you can charge in the -- you could plead in the  
03:22:42 14 conjunctive and win if you prove the conjunctive. And I'm  
03:22:46 15 trying to figure out what conjunctives to put in here in  
03:22:50 16 this first -- in (a).

03:22:53 17 And as I understand it, there is no evidence that the  
03:22:59 18 breach, whatever it may have been, was of Jeld-Wen's  
03:23:04 19 standard written warranty; is that correct?

03:23:08 20 MS. ECKSTEIN: Yes.

03:23:09 21 THE COURT: All right. So that doesn't go in  
03:23:12 22 the instruction. So (a) -- 3(a) is right up to that  
03:23:16 23 point.

03:23:17 24 Then we have to separate out, it seems to me, the  
03:23:22 25 next issue, because there's no issue on notice for the

03:23:28 1 door skins, as I understand it now. And -- so (c) would  
03:23:39 2 become (b), and (c) -- and (b) would -- and so new (b),  
03:23:48 3 old (c), would be, "Jeld-Wen did not reimburse Steves for  
03:23:51 4 the price of those door skins." And then "Jeld-Wen's  
03:23:56 5 failure to reimburse Steves for those door skins caused  
03:24:01 6 the loss claim." Is that right?

03:24:04 7 MS. ECKSTEIN: Yes.

03:24:05 8 MS. MALTAS: Yes.

03:24:05 9 THE COURT: Do you all agree?

03:24:06 10 MS. MALTAS: Yes, Your Honor.

03:24:11 11 MS. ECKSTEIN: For the door skins, yes.

03:24:13 12 THE COURT: We're only doing the door skins now.

03:24:21 13 Then (e) would become (c).

03:24:27 14 MS. ECKSTEIN: Yes.

03:24:38 15 MR. POWELL: For (e) becoming (c), should it  
03:24:40 16 say, "Failure to reimburse Steves for the price of those  
03:24:45 17 door skins," just to be clear?

03:24:48 18 THE COURT: I think that -- I was getting ready  
03:24:49 19 to put something in there once I saw where it fit and how  
03:24:54 20 it fit. And I think that's the correct language.

03:25:16 21 And then there would be another provision, then, that  
03:25:19 22 would say, "Also as to Section 8," and then we would pick  
03:25:42 23 up what was old (d) as -- and we'll just call it (e) so as  
03:26:01 24 to avoid confusion. And that would be, "Jeld-Wen was  
03:26:07 25 required to but did not reimburse Steves for the cost of

03:26:11 1 doors manufactured by Steves that incorporated defective  
03:26:14 2 door skins sold to Steves by Jeld-Wen," right? I mean,  
03:26:19 3 that's another alleged breach of 8. There are three  
03:26:24 4 alleged breaches of 8.

03:26:26 5 MS. MALTAS: Yes.

03:26:27 6 THE COURT: One is the door skins. One is the  
03:26:29 7 doors. The other is the in-plant damage, right?

03:26:34 8 Where is that chart from that damage expert?

03:26:37 9 MS. ECKSTEIN: That's right.

03:26:40 10 MR. BUTERMAN: That's correct, your Honor.

03:26:41 11 THE COURT: All right. And so we have to tell  
03:26:43 12 them what it is they have to find to find a breach.

03:26:47 13 MS. MALTAS: That's right, Your Honor.

03:26:48 14 THE COURT: That's what I'm trying to do is to  
03:26:50 15 construct the next section of this.

03:26:52 16 MS. MALTAS: Yes. I --

03:26:54 17 THE COURT: Except I will hear you in just a  
03:26:55 18 minute about whether the in-plant damage even should go in  
03:27:00 19 here. That, to me, is so far unproved and beyond the pale  
03:27:05 20 that it's wasting our time even to put it in.

03:27:09 21 MS. MALTAS: And, Your Honor, I would just  
03:27:11 22 question whether we should repeat what was section (a)  
03:27:14 23 again to confirm that Steves needs to prove that the --  
03:27:19 24 what the defective door skins are incorporated in the  
03:27:23 25 doors or if that just defective door skins naturally

03:27:27 1 incorporates the concept of the breach.

03:27:33 2 MR. DANE: Your Honor, in that regard, I had a  
03:27:35 3 similar thought as to Ms. Maltas, which is perhaps to have  
03:27:39 4 two versions of (a). The first would be as the Court as  
03:27:43 5 written it, "Jeld-Wen shipped Jeld-Wen molded door skins  
03:27:47 6 products to Steves, comma, which were not included in  
03:27:49 7 doors, comma, that did not meet the specifications." That  
03:27:53 8 would be for this first set.

03:27:54 9 And then for the second set, repeat that and say,  
03:27:57 10 "Jeld-Wen shipped Jeld-Wen molded door skins products to  
03:28:00 11 Steves which were included in doors sold by Steves."

03:28:05 12 THE COURT: Do you agree with that, Ms. Maltas?

03:28:08 13 MS. MALTAS: Yes. That's fine.

03:28:09 14 THE COURT: I think that's a good -- I'm just  
03:28:11 15 going to put, "shipped molded door skin products to  
03:28:18 16 Steves, paren, not included in doors," right?

03:28:24 17 MR. DANE: Yes.

03:28:35 18 MR. BUTERMAN: Your Honor --

03:28:38 19 THE COURT: "That Steves did not" -- yes. What,  
03:28:41 20 Mr. Buterman?

03:28:42 21 MR. BUTERMAN: The only thing I'm concerned  
03:28:44 22 about is the idea that the jury may think that that first  
03:28:46 23 3(a) includes the in-plant damages, because those are --

03:28:52 24 THE COURT: They ain't going to have to worry  
03:28:54 25 about that because they're not going to go to the jury on

03:28:56 1 in-plant damages.

03:28:58 2 MR. BUTERMAN: Okay. Thank you, Your Honor.

03:28:59 3 THE COURT: I mean, there's no evidence to  
03:29:00 4 support that. When you take the product, you take the --  
03:29:04 5 you accept the risk. Once you take delivery of it, you've  
03:29:07 6 got the risk of delivery once you handle it and what  
03:29:10 7 happens in a plant. And the only way you can do that is  
03:29:14 8 to somehow have some evidence that says that the standard  
03:29:17 9 industry practice -- or there was a specific agreement  
03:29:20 10 that it would come packaged in such a way as to protect,  
03:29:24 11 et cetera, et cetera. And there wasn't any evidence, and  
03:29:31 12 it just -- but I -- let's see.

03:29:53 13 I don't think that's right. I think that's a mistake  
03:29:55 14 to put that in there. Because it suggests -- they're just  
03:30:00 15 free-floating door skins. The language about they weren't  
03:30:04 16 included in door skins, I don't think, doesn't -- so --

03:30:14 17 MR. DANE: Your Honor, I do think that that is  
03:30:16 18 an accurate statement, because Steves viewed these to be  
03:30:19 19 defective door skins. So they never did end up in any  
03:30:22 20 doors sold by Steves.

03:31:10 21 THE COURT: All right. And then paragraph (e)  
03:31:11 22 would be a repeat of (a) and -- except that the  
03:31:19 23 parenthetical would be that Steves did include in doors.

03:31:32 24 MS. ECKSTEIN: Correct.

03:31:41 25 THE COURT: All right. And then (f) would be



03:31:45 1 old (d).

03:31:48 2 MS. MALTAS: Your Honor, I think (f) would be  
03:31:50 3 old (b), because we do have an issue regarding notice and  
03:31:53 4 opportunity to inspect the actual doors.

03:31:58 5 MS. ECKSTEIN: And I think that's right. I  
03:31:59 6 would switch out the word "door" for "door skin" and add  
03:32:04 7 the futility language.

03:32:06 8 MS. MALTAS: And I would not add the futility  
03:32:09 9 language.

03:32:19 10 THE COURT: I don't think it's necessary to add  
03:32:21 11 40-A, though. Why should we have to add that?

03:32:26 12 MR. BUTERMAN: I'm sorry, Your Honor?

03:32:27 13 MS. MALTAS: 40-A.

03:32:28 14 THE COURT: If I add the futility language, why  
03:32:31 15 do you add 40-A? I don't have it. I don't know where it  
03:32:35 16 is. Excuse me. I've lost my copy of it.

03:32:45 17 Have you got 40-A? Okay. Because I don't know what  
03:32:49 18 they did with it. It came over with the new set. We've  
03:32:55 19 had so many iterations of this thing. Yeah, that's what  
03:32:59 20 it is. That's it right there. Yep. Thank you. 40-A.

03:33:09 21 I don't think 40-A goes in there. I just -- your  
03:33:12 22 issue it would have been futile because -- because of the  
03:33:17 23 notice -- because of the instruction that they weren't  
03:33:20 24 going to pay for doors, right?

03:33:23 25 MS. ECKSTEIN: Right. That it would have been

03:33:25 1 futile to provide notice because they wouldn't pay for the  
03:33:27 2 doors.

03:33:28 3 THE COURT: That's all -- I'm not going to put  
03:33:30 4 in 40-A, I don't think. There's no reason for it.

03:33:33 5 MS. ECKSTEIN: The second part of 40-A addressed  
03:33:35 6 that futility issue.

03:33:37 7 THE COURT: I know, but --

03:33:38 8 MS. ECKSTEIN: Okay.

03:33:39 9 THE COURT: -- see, we're going to load the jury  
03:33:41 10 down with so much junk that they're never going to  
03:33:44 11 understand anything and they're going to get tied up.  
03:33:47 12 That's the problem with instructions that conceptually are  
03:33:50 13 okay but that really don't fit what we're doing. You'll  
03:33:53 14 be able to make the argument about the futility.

03:33:57 15 MS. ECKSTEIN: Thank you, Your Honor.

03:34:00 16 MR. DANE: And, Your Honor, does that mean that  
03:34:01 17 you'll include the language in 3(b) that proof to doing so  
03:34:10 18 would be futile?

03:34:11 19 THE COURT: Yes.

03:34:12 20 MS. ECKSTEIN: That makes sense. Thank you.

03:34:13 21 THE COURT: And then (g) will be old (d). And  
03:34:17 22 then (h) will be the same as old (e) or new (c).  
03:34:30 23 Jeld-Wen's failure to reimburse Steves for the price of  
03:34:37 24 those doors caused the -- the loss claim.

03:34:50 25 MS. MALTAS: Your Honor, if I can just clarify

03:34:52 1 one thing on the futility point, which I understand Your  
03:34:57 2 Honor is going to include in what's now new (f). My read  
03:35:00 3 of the case law is that the futility argument only goes to  
03:35:04 4 the actual notice, not to the requirement to inspect. So  
03:35:09 5 I think that that's two separate issues that Jeld-Wen has  
03:35:11 6 with the doors. And the inspection really only -- it  
03:35:14 7 applies specifically to the REEB claim where notice was  
03:35:17 8 given but the contractual requirement that Jeld-Wen  
03:35:20 9 inspect was not provided.

03:35:23 10 THE COURT: It may be, but I think this  
03:35:25 11 instruction covers the situation.

03:35:28 12 All right.

03:35:31 13 MR. POWELL: Your Honor, may I make a  
03:35:33 14 grammatical point about this whole instruction, something  
03:35:36 15 I just noticed, when you're finished writing?

03:36:01 16 THE COURT: Yes.

03:36:02 17 MR. POWELL: It has to do with the separation  
03:36:05 18 between paragraphs 1, 2, and 3 and whether there should be  
03:36:11 19 a period at the end of each of them. If you'll notice, at  
03:36:14 20 the end of paragraph 1, right after 1(d), there's a  
03:36:17 21 semicolon, which then goes to number 2. And then at the  
03:36:21 22 end of paragraph 2, after 2(c), it says semicolon "and,"  
03:36:26 23 which suggests to me that the jury might conclude that  
03:36:29 24 Steves has to prove all three of these in order to recover  
03:36:34 25 for breach of contract.

03:36:37 1 THE COURT: I don't have my hands on my --

03:36:50 2 MR. POWELL: My suggestion is there should be --

03:36:51 3 THE COURT: Wait just a minute until I find my  
03:36:54 4 paper. There ought to be a period after "overcharges" on  
03:37:00 5 the first thing, right?

03:37:05 6 MR. POWELL: I think that's correct, Your Honor.  
03:37:05 7 And then --

03:37:06 8 THE COURT: Yeah. And then as to the alleged  
03:37:06 9 breach of Section 6, we go to another section, right?

03:37:09 10 MR. POWELL: I agree about with that, Your  
03:37:11 11 Honor. So that ends with a period, and you strike "and"  
03:37:14 12 then you go to paragraph --

03:37:17 13 THE COURT: There isn't any "and" on my copy.

03:37:22 14 MS. ECKSTEIN: I think Mr. Powell moved on to  
03:37:24 15 the Section 6 paragraph as well.

03:37:25 16 THE COURT: Oh.

03:37:25 17 MS. ECKSTEIN: And at the end of that one,  
03:37:27 18 there's a semicolon and an "and" that I think should be a  
03:37:32 19 period.

03:37:32 20 THE COURT: I agree with that.

03:37:33 21 MR. POWELL: And strike the --

03:37:36 22 THE COURT: Wait just a minute. And then as to  
03:37:37 23 Section 8. And then instead of saying "also" --

03:37:54 24 MR. POWELL: I lost track, Your Honor, of what's  
03:37:56 25 happened to the Section 8 subparts and where --

03:38:02 1 THE COURT: Do you know what Section 8 is in the  
03:38:04 2 Army?

03:38:05 3 MR. POWELL: Yes, I do, actually, Your Honor.  
03:38:07 4 Maybe I should ask for one right now.

03:38:09 5 THE COURT: That's where I feel like I ought to  
03:38:10 6 be.

03:38:11 7 MR. POWELL: Yeah. Yeah. I think maybe we've  
03:38:12 8 all earned it, Your Honor.

03:38:15 9 THE COURT: Wait just a minute.

03:38:53 10 At the end -- the second page of Instruction 39, at  
03:38:56 11 the end of 2(c), put a period after "claimed" and delete  
03:39:01 12 the word "and."

03:39:03 13 The beginning of 3, as to the alleged breach of  
03:39:05 14 Section 8, paren, respecting door skins, closed paren.  
03:39:14 15 And then -- we've made the changes. And so as to the  
03:39:28 16 doors part of it, there will be a parallel instruction  
03:39:33 17 that says, "As to the alleged breach of Section 8, paren,  
03:39:36 18 respecting doors."

03:39:39 19 MR. POWELL: That would be --

03:39:40 20 THE COURT: And then we will go into paragraphs  
03:39:41 21 (e), (f), (g), (h) as we have discussed.

03:39:45 22 MR. POWELL: So the doors section will be number  
03:39:47 23 4?

03:39:49 24 THE COURT: It will be the -- it will be -- yes.  
03:39:51 25 It should be 4. That's correct.

03:40:01 1           So then 3 will be, "As to the alleged breach of  
03:40:04 2 Section 8, paren, respecting door skins, colon," and then  
03:40:11 3 it will be as you have it. And then in -- there will be  
03:40:17 4 inserted in the second line of paragraph 3(a), after the  
03:40:23 5 word "products," "that Steves did not include in doors,  
03:40:31 6 closed paren." And then old section -- subparagraph -- or  
03:40:36 7 paragraph (c) will become (b), "Jeld-Wen did not reimburse  
03:40:43 8 Steves for the price of those door skins." And the word  
03:40:47 9 "or" will come out. And then old (e), which will become  
03:40:53 10 (c), and it says, "Jeld-Wen's failure to reimburse Steves  
03:40:56 11 for the price of those door skins caused the losses  
03:40:59 12 claimed."

03:41:07 13           Then we will go to 4. "As to the alleged breach of  
03:41:10 14 Section 8, paren, respecting doors, colon." And paragraph  
03:41:14 15 (e) will be a repeat of (a) except that the parenthetical  
03:41:22 16 will be, "That Steves did include in doors." (f) will  
03:41:28 17 become old (b), and the shaded area about the futility  
03:41:33 18 will be put in. (g) will become old (d), and (h) will be  
03:41:42 19 a repeat of (c) except that it will say, "for the price of  
03:41:48 20 those doors."

03:41:53 21           MR. POWELL: That sounds right to me, Your  
03:41:54 22 Honor. It might be well for Mr. Martecchini, if he  
03:41:57 23 wouldn't mind, with your permission, sending this one out  
03:42:00 24 for us to look at this evening.

03:42:04 25           THE COURT: I don't -- I think if you can't

03:42:06 1 memorize that stuff, you should just quit.

03:42:10 2 MR. POWELL: That's why I earned a Section 8,  
03:42:12 3 Your Honor.

03:42:12 4 THE COURT: No. We'll get this straight -- I'm  
03:42:15 5 just trying to get it straight now. And then we'll --  
03:42:18 6 we'll give it to you and make sure that it does what we  
03:42:21 7 intended it to do.

03:42:22 8 MR. POWELL: The only other suggestion, Your  
03:42:24 9 Honor, just for the benefit of the jury, where we've got  
03:42:26 10 at beginning where we say "did not include" or "did  
03:42:30 11 include," maybe to emphasize those in some fashion so the  
03:42:34 12 jury appreciates the difference between 3 and 4? That's  
03:42:39 13 just an emphasis.

03:42:41 14 THE COURT: What do you mean emphasize it? What  
03:42:43 15 do you mean?

03:42:43 16 MR. POWELL: Much the way, in the verdict form,  
03:42:45 17 we try to emphasize damages already incurred versus --

03:42:50 18 THE COURT: You mean bolding them or something  
03:42:51 19 like that?

03:42:52 20 MR. POWELL: Yes, sir. That was all my --

03:42:56 21 THE COURT: What do you all say?

03:42:58 22 MR. BUTERMAN: We have no problem with that,  
03:42:59 23 Your Honor.

03:43:00 24 THE COURT: Okay.

03:43:04 25 MR. DANE: Your Honor, at the risk of the

03:43:06 1 incurring the Court's wrath, I --

03:43:08 2 THE COURT: Why do you say that?

03:43:12 3 MR. DANE: Because I'm --

03:43:12 4 THE COURT: I mean, I stayed here until 9:00  
03:43:15 5 last night. Where were you?

03:43:17 6 MR. DANE: I was here, Your Honor.

03:43:19 7 THE COURT: Yeah. Did we have any wrath going  
03:43:21 8 on?

03:43:23 9 MR. DANE: No. It was just meant as a joke,  
03:43:24 10 Your Honor.

03:43:25 11 THE COURT: What have you got?

03:43:28 12 MR. DANE: Just on 1(b), at the beginning of the  
03:43:30 13 instruction where it's referring to the Craftsman issue  
03:43:32 14 that we added yesterday -- or the Court added after the  
03:43:36 15 conference yesterday, it says, "The Craftsman pricing  
03:43:38 16 provisions in Schedule 1 apply to the Madison and Monroe  
03:43:42 17 door skins because those styles are Craftsman door skins."  
03:43:45 18 I would just suggest one modest amendment, which would be  
03:43:48 19 to say "are Craftsman style door skins."

03:43:53 20 MS. MALTAS: Your Honor, we don't agree with  
03:43:54 21 that. Craftsman is an actual style that's used as a term  
03:43:58 22 of art by Jeld-Wen. And that's what that is referring to.  
03:44:03 23 Of course, anyone who's had any sort of home renovations  
03:44:06 24 in the past five to ten years know that Craftsman cabinets  
03:44:11 25 and doors are a popular style of doors. So we don't want



03:44:15 1 the jury getting confused thinking that because that door  
03:44:17 2 they're looking at is, indeed, a Craftsman style of door,  
03:44:20 3 that makes it a, big C, Jeld-Wen Craftsman door.

03:44:27 4 MR. DANE: Your Honor, the reason for this, our  
03:44:30 5 whole argument on this always has been we understand the  
03:44:32 6 name of the design is Monroe and Madison. The name is not  
03:44:36 7 Craftsman. But our position is that the contract covered  
03:44:40 8 the full Jeld-Wen line. And when there's a later  
03:44:43 9 introduced product, what you do is you look at the pricing  
03:44:46 10 schedule and you find the closest match. And the closest  
03:44:50 11 match to the Madison/Monroe, because they are the smooth  
03:44:55 12 panel designs, is it's a Craftsman style, even  
03:44:58 13 if it's not -- it's obviously not called Craftsman and we  
03:45:01 14 don't want them arguing just look at the word. It's  
03:45:04 15 Monroe or Madison. Therefore, it can't be the Craftsman  
03:45:08 16 price because it's not named Craftsman. But that's not  
03:45:08 17 our argument.

03:45:09 18 THE COURT: What do you want to do?

03:45:11 19 MR. DANE: I just want to put the word "style."  
03:45:14 20 And Ms. Maltas admitted there's Craftsman style.

03:45:19 21 THE COURT: Where? Where? The style -- you've  
03:45:20 22 lost me.

03:45:21 23 MR. DANE: In 1(b) where it says, "The Craftsman  
03:45:23 24 pricing provisions in Schedule 1 apply to the Madison and  
03:45:25 25 Monroe door skins because those styles are Craftsman style

03:45:29 1 door skins."

03:45:34 2 MS. MALTAS: And, Your Honor, I am not aware of  
03:45:37 3 any evidence being put into the record to the jury that  
03:45:41 4 the jury can look at the sort of amorphous style of the  
03:45:48 5 door skin in determining what pricing in the supply  
03:45:51 6 agreement. Nothing from any Jeld-Wen employee for sure.

03:45:55 7 And the way it was presented, I think by the Steves  
03:45:57 8 employees, was referring to the term of art, the actual  
03:46:00 9 style sold by Jeld-Wen that is Craftsman. And so this is  
03:46:05 10 very confusing. I don't think it's supported by the  
03:46:08 11 evidence, and it shouldn't be presented to the jury.

03:46:11 12 MS. ECKSTEIN: There is evidence in the record  
03:46:13 13 from Mr. Gartner, and I believe Mr. Steves, about these  
03:46:15 14 doors being Craftsman style doors. And I believe there's  
03:46:18 15 also a brochure that was put in the record that -- from  
03:46:21 16 Jeld-Wen that referred to these as Craftsman doors.

03:46:24 17 THE COURT: I think the suggested change is a  
03:46:29 18 correct change. The word "styles" on the last line ought  
03:46:36 19 to be deleted, and after "Craftsman," the word "style"  
03:46:42 20 ought to be included before the word "door skins."

03:46:48 21 MR. DANE: Thank you, Your Honor.

03:46:49 22 THE COURT: All right. Are we through with this  
03:46:49 23 now?

03:46:50 24 MR. MACH: There's just one small thing to flag  
03:46:53 25 for --

03:46:55 1 THE COURT: No.

03:46:56 2 MR. MACH: I didn't say anything about wrath.

03:46:58 3 THE COURT: Where is it?

03:46:59 4 MR. MACH: I don't think this requires  
03:47:00 5 resolution in the discussion, but I just want to flag that  
03:47:03 6 Instruction 28 contains the efficiencies language that is  
03:47:07 7 the subject of --

03:47:09 8 THE COURT: Twenty-eight? I'm on 39.

03:47:11 9 MR. MACH: Yeah. On 39, this is not --

03:47:16 10 THE COURT: I asked is there anything else about  
03:47:18 11 39, and you said yes.

03:47:18 12 MR. MACH: I misheard you. I apologize.

03:47:18 13 THE COURT: Okay.

03:47:18 14 MS. ECKSTEIN: He thought we were done with the  
03:47:20 15 jury instructions altogether.

03:47:22 16 MR. MACH: I did. I was optimistic.

03:47:24 17 THE COURT: All right. Now, the let's see. I  
03:47:26 18 think there -- on 40 -- on 40, subparagraph -- or  
03:47:35 19 paragraph 3, Steves proposed adding, "In considering the  
03:47:41 20 history of negotiations, you should consider only evidence  
03:47:43 21 of what both parties knew or should have known." Is that  
03:47:50 22 right?

03:47:51 23 MS. ECKSTEIN: Yes, sir.

03:47:52 24 MS. MALTAS: Yes. And Jeld-Wen objects to that  
03:47:55 25 being included.

03:47:56 1 THE COURT: Well, the decision in United  
03:47:59 2 Rentals, the judge did a very good job of explaining what  
03:48:05 3 the situation is. And I suppose that what you're trying  
03:48:11 4 to do is to pick up the part of the decision on page 835  
03:48:17 5 and 836 about how you consider extrinsic evidence. There,  
03:48:33 6 the judge explains from a recent decision that he made, a  
03:48:39 7 letter decision, "Evidence" -- he cites from the earlier  
03:48:45 8 decision in footnote 118. "Evidence of one side's  
03:48:50 9 undisclosed private mental impressions or understandings  
03:48:54 10 is useless. It is generally not the parties' unexpressed  
03:48:58 11 intent or understanding that that is relevant."

03:49:00 12 And then up in the text, he says, "As I recently  
03:49:05 13 explained to counsel in this case" -- I think maybe he  
03:49:09 14 might have been frustrated, or she might have been  
03:49:12 15 frustrated with the lawyers.

03:49:17 16 So anyway, "The private subjective feelings of the  
03:49:22 17 negotiators are irrelevant and unhelpful to the Court's  
03:49:27 18 consideration of a contract's meaning, footnote 118,  
03:49:32 19 because a meaning of a properly formed contract must be  
03:49:36 20 shared or common." Footnote 119 citing the restatement  
03:49:39 21 section of contracts. "That is not to say, however, that  
03:49:44 22 a party's subjective understanding is never instructive.  
03:49:48 23 On the contrary, in cases where an examination of the  
03:49:52 24 extrinsic evidence does not lead to an obvious objectively  
03:49:55 25 reasonable conclusion, the Court may apply the forthright

negotiator principle."

I've heard the principle described but never described as the forthright negotiator principle.

"Under this principle, the Court considers the evidence of what one party subjectively believed the obligation to be, coupled with evidence that the other party knew or should have known of such belief."

And that, in my recollection, is a correct statement of the law generally about the consideration of parol evidence.

So I think that the instruction you're asking for is correct.

MS. ECKSTEIN: Thank you.

MS. MALTAS: And, Your Honor --

THE COURT: You object to it?

MS. MALTAS: We do, Your Honor. Having gone through all of the testimony by Mr. Edward Steves and Mr. Sam Steves, Mr. John Ambruz, and Mr. Philip Orsino, it just doesn't seem that there's any place where the jury would conclude that either party either didn't know or, you know, should not have known what the other party's intent was.

It's very clear that all -- Mr. Edward Steves, Mr. Orsino, Mr. Ambruz were all involved. Mr. Ambruz did more direct negotiation, but he testified in his

03:51:18 1 deposition it was all at the direction of Mr. Orsino. He  
03:51:22 2 discussed the strategy with Mr. Orsino. He would never  
03:51:25 3 countermand any instruction provided to him by Mr. Orsino.  
03:51:29 4 And so I think it will just unnecessarily confuse the jury  
03:51:33 5 to be thinking back who is this possibility relating to  
03:51:37 6 when there's nothing in the record that would suggest to  
03:51:40 7 them that anyone was unaware of the subjective intention  
03:51:44 8 of the other side.

03:51:48 9 MS. ECKSTEIN: The jury has listened to a  
03:51:50 10 significant amount of evidence regarding the history of  
03:51:53 11 the parties' negotiations, the back and forth, including  
03:51:56 12 testimony from Mr. Ambruz about discussions that he had  
03:51:59 13 with Edward Steves that he then relayed to Mr. Orsino.  
03:52:03 14 And then they went back and forth about what to do about  
03:52:06 15 Mr. Edward Steves' position.

03:52:09 16 THE COURT: You're referring to the keep it  
03:52:13 17 silent?

03:52:14 18 MS. ECKSTEIN: Yes, sir.

03:52:15 19 THE COURT: Yeah. I mean, that's where this  
03:52:16 20 fits in.

03:52:17 21 MS. ECKSTEIN: Yes, sir.

03:52:18 22 THE COURT: This is -- but the question I have  
03:52:19 23 is does this instruction capture the applicable law?

03:52:25 24 MS. ECKSTEIN: I believe that it does,  
03:52:26 25 absolutely, based on the case that you mentioned and the

03:52:29 1 language there.

03:52:32 2 MS. MALTAS: And, Your Honor, Mr. -- I do know  
03:52:34 3 what Mr. Ambruz testified to regarding that e-mail.  
03:52:37 4 Mr. Orsino explicitly testified that he instructed  
03:52:41 5 Mr. Ambruz to not add -- not add additional language to  
03:52:48 6 the supply agreement. That's what he meant by keep  
03:52:51 7 silent. He was not in any way --

03:52:53 8 THE COURT: That's what he said he meant, but  
03:52:55 9 one could interpret that language a little differently.

03:53:00 10 MS. MALTAS: Exactly.

03:53:00 11 THE COURT: I think you're going to hear an  
03:53:03 12 argument to the contrary, shall I say.

03:53:06 13 MS. MALTAS: Yeah. And that's the province of  
03:53:06 14 the jury, to weigh all of these recollections, Mr. Orsino,  
03:53:06 15 who was the CEO, Mr. Ambruz, who's now employed by Steves,  
03:53:10 16 and to decide who is more accurately recollecting what  
03:53:13 17 happened. But we don't need any additional language in  
03:53:16 18 the jury instruction that will just confuse the jury.

03:53:19 19 MR. DANE: Your Honor --

03:53:21 20 THE COURT: I mean, I understand where we are.  
03:53:24 21 Jeld-Wen objects to the proposed addition. Steves is  
03:53:28 22 satisfied with the language and -- and I believe that  
03:53:32 23 if -- that's the language that you want to put in --

03:53:36 24 MR. DANE: Your Honor, I was going to suggest  
03:53:37 25 some other language, perhaps, in response to the Court's

03:53:40 1 comment.

03:53:41 2 THE COURT: I'm going to keep my mouth closed.

03:53:45 3 What?

03:53:46 4 MR. DANE: "The subjective understanding of one  
03:53:48 5 party to a contract that was not communicated to the other  
03:53:51 6 party during negotiations is irrelevant to contract  
03:53:54 7 interpretation." I believe that's the essence of the  
03:54:00 8 case.

03:54:00 9 THE COURT: It is, perhaps. What does that do  
03:54:04 10 to your side of the case, too? What does that mean the  
03:54:08 11 jury can considers? That's what Ms. Maltas -- that's the  
03:54:12 12 point I think Ms. Maltas was raising. Are you not --

03:54:15 13 MS. MALTAS: If that language --

03:54:17 14 THE COURT: Were you not raising that point?

03:54:19 15 MS. MALTAS: Exactly. And having personally  
03:54:20 16 read all of the testimony, there is very little that  
03:54:22 17 anyone testified to that they conveyed to the other side.  
03:54:26 18 And so with that language, they are not going to be  
03:54:29 19 considering anyone's interpretation of the contract.

03:54:41 20 MS. ECKSTEIN: We'll withdraw that  
03:54:41 21 recommendation.

03:54:42 22 THE COURT: Which recommendation?

03:54:43 23 MS. ECKSTEIN: We'll go with the language that  
03:54:44 24 you have in this proposed.

03:54:47 25 THE COURT: It will be in.



03:54:50 1 Your objection is preserved, Jeld-Wen.

03:54:53 2 MS. MALTAS: Thank you, Your Honor.

03:54:55 3 THE COURT: All right. Let's see. All right.

03:55:02 4 That, I think, deals with all of the -- was that every

03:55:06 5 place that we needed to inform them or to talk about,

03:55:09 6 Mr. Martecchini?

03:55:11 7 MR. MARTECCHINI: That's all I had.

03:55:14 8 THE COURT: Okay. That's all we have on these

03:55:16 9 instructions.

03:55:22 10 And it assumes that all of these will go to the jury,

03:55:34 11 these instructions, because it's easier to take things out

03:55:39 12 than it is to put them in late. All right.

03:55:42 13 MR. MACH: I think that's consistent, Your

03:55:43 14 Honor, with --

03:55:44 15 THE COURT: Now, did you have something you

03:55:45 16 wanted to say about Instruction Number 28?

03:55:48 17 MR. MACH: With your permission. I was just

03:55:50 18 going to make the observation that Instruction 28 could be

03:55:54 19 impacted by our -- our motion for judgment as a matter of

03:55:58 20 law, which we filed shortly before noon today. It doesn't

03:56:01 21 need to be resolved prior to the resolution of that

03:56:04 22 motion, but it concerns the efficiencies language in Rule

03:56:07 23 28.

03:56:09 24 THE COURT: All right. Now we need the verdict

03:56:12 25 forms. Now, what we've done is to take the verdict forms

03:56:17 1 that -- the most recent that came to us, including the one  
03:56:21 2 you did, and put it into the format that we have.

03:56:29 3 Now, I don't see any need -- do you have that in  
03:56:36 4 front of you, both of you?

03:56:38 5 MR. BUTERMAN: Yes, Your Honor.

03:56:39 6 THE COURT: I don't see any need for two.

03:56:46 7 MR. BUTERMAN: Your Honor --

03:56:48 8 THE COURT: I think that you just go 3 becomes  
03:56:50 9 2, et cetera, et cetera.

03:56:52 10 MR. BUTERMAN: Your Honor, the -- the reason why  
03:56:55 11 we believe that 2 is necessary, and I'll note, as I did in  
03:56:59 12 the papers, that 2 is actually the verbatim of what the  
03:57:02 13 Court had proposed in its longer verdict form initially.

03:57:07 14 THE COURT: I had tendered it for  
03:57:09 15 consideration --

03:57:10 16 MR. BUTERMAN: Yes. Sorry, Your Honor.

03:57:11 17 THE COURT: -- based upon what you all had put  
03:57:13 18 in -- put out. I mean that's what I did.

03:57:16 19 MR. BUTERMAN: Yes, Your Honor. And the reason  
03:57:17 20 why we believe that this is necessary --

03:57:19 21 THE COURT: I think what I told you was I  
03:57:21 22 preferred the shorter one where this language wasn't  
03:57:24 23 included --

03:57:24 24 MR. BUTERMAN: Well, Your Honor, what's --

03:57:27 25 THE COURT: -- when I gave you that information,

03:57:29 1 gave you those alternatives.

03:57:32 2 MR. BUTERMAN: Well, Your Honor, what Steves did  
03:57:33 3 was they pulled some language into the breach of contract  
03:57:37 4 section, which essentially makes the breach of contract  
03:57:40 5 section more of a special verdict form. The problem on  
03:57:44 6 the -- on the antitrust side is that we believe it would  
03:57:48 7 be wrong for the jury to leap from the fact that there's a  
03:57:52 8 Section 7 violation to immediately go to calculating the  
03:57:59 9 damages for that. In an antitrust claim, as Your Honor  
03:58:03 10 knows, there are three elements.

03:58:04 11 THE COURT: They have been told this. They --  
03:58:07 12 you don't always have to make a finding on every element  
03:58:11 13 of every claim.

03:58:12 14 MR. BUTERMAN: I understand, Your Honor. But  
03:58:13 15 there is a concern here. And it's something that we have  
03:58:16 16 seen in other antitrust cases, which is part of the reason  
03:58:19 17 why we're asking for it.

03:58:20 18 THE COURT: You have not either seen that in any  
03:58:23 19 other antitrust case tried to a jury under Clayton 7, have  
03:58:29 20 you? Because there haven't been any, according to what  
03:58:33 21 you all have said.

03:58:36 22 MR. BUTERMAN: In the Section 7 case, I'm not  
03:58:38 23 sure, Your Honor. I --

03:58:40 24 THE COURT: Well, you all keep telling me this  
03:58:41 25 is one --

03:58:43 1 MR. BUTERMAN: Your Honor, but --

03:58:45 2 THE COURT: One at a time.

03:58:46 3 MR. BUTERMAN: I apologize. Your Honor, the  
03:58:48 4 point is, though, that it still would be a -- we believe  
03:58:52 5 it would be wrong for the jury to make that leap.

03:58:54 6 Antitrust injury is a necessary part of this. It goes  
03:58:59 7 violation, antitrust injury and then damages. And that's  
03:59:04 8 all we're asking for, to make sure that we have a finding  
03:59:07 9 that the jury finds what's considered antitrust injury.  
03:59:11 10 So that --

03:59:12 11 THE COURT: What's your position on this? Any  
03:59:14 12 objection to putting 2 in?

03:59:18 13 MR. MACH: We do object, Your Honor.

03:59:19 14 THE COURT: Why?

03:59:20 15 MR. MACH: Well, it's in the instructions and  
03:59:21 16 the jury is capable of following the instructions. It is  
03:59:24 17 a predicate that they will resolve as they follow the  
03:59:26 18 instructions and before they answer the question of  
03:59:29 19 whether there are damages. And I think what's -- what  
03:59:33 20 we're seeing here is just a trend -- trend toward a  
03:59:39 21 verdict form that is more complicated and potentially,  
03:59:41 22 thus, more confusing for the jury than it needs to be.

03:59:45 23 MR. BUTERMAN: Your Honor, if I may just make  
03:59:47 24 one additional point. The --

03:59:48 25 THE COURT: I thought what you were going to do

03:59:50 1 was you were going to give me two little paragraphs. And  
03:59:57 2 what you gave me was three pages that converted a simple  
04:00:00 3 verdict form into a very complex one, and I don't want  
04:00:02 4 that.

04:00:03 5 MR. BUTERMAN: I --

04:00:03 6 THE COURT: I don't think it's helpful for the  
04:00:07 7 jury. I think you tell the jury the instructions and then  
04:00:09 8 you put them to their task.

04:00:12 9 MR. BUTERMAN: Except there are two separate  
04:00:13 10 sections here that are relevant, Your Honor. And that was  
04:00:16 11 a change that Steves actually requested yesterday. They  
04:00:19 12 made us put in Section 7 and then Section 4. And what  
04:00:23 13 we're saying is that part 1 is the Section 7 analysis.  
04:00:26 14 Part 2 is the Section 4 analysis, which they specifically  
04:00:30 15 wanted to have called out for the jury in the jury  
04:00:35 16 instructions. And then we go to damages. And that's all  
04:00:38 17 we're suggesting, Your Honor, with respect to question 2.

04:00:43 18 THE COURT: I understand. What about 3? Do you  
04:00:46 19 agree with 3 or not? Last night you said you agreed with  
04:00:52 20 putting in over -- something about overcharges and  
04:00:58 21 defects. Now you all have got four or five different  
04:01:04 22 things in here.

04:01:06 23 MR. BUTERMAN: May I explain, Your Honor?

04:01:08 24 THE COURT: Yeah. Why? Why did you do this?

04:01:11 25 MR. BUTERMAN: Yes. Your Honor, honestly, when

04:01:12 1 we went back, what we realized is that there are -- there  
04:01:16 2 is this overlap between the breach claims and the  
04:01:22 3 antitrust claims. And what we do not want to happen, with  
04:01:26 4 all due respect, is that if this issue goes to the Fourth  
04:01:30 5 Circuit and the Fourth Circuit has to make a determination  
04:01:32 6 on this, that they will not be able to decide whether a  
04:01:39 7 portion of these damages shouldn't have been allowed. If  
04:01:42 8 they -- if they do not have this level of specificity,  
04:01:47 9 then if -- they will be left without any way of actually  
04:01:52 10 discerning whether there is a problem that requires  
04:01:55 11 resolution.

04:01:57 12 So, for instance, Your Honor, if the Fourth Circuit  
04:02:00 13 were to determine --

04:02:01 14 THE COURT: We, the jury, find for the plaintiff  
04:02:03 15 on this antitrust claim. We award X damages total.  
04:02:08 16 That's all.

04:02:09 17 MR. BUTERMAN: Yes, Your Honor.

04:02:10 18 THE COURT: They can do that. That's a general  
04:02:12 19 verdict form, and there's no issue for the Fourth Circuit,  
04:02:15 20 or anybody else, to decide. You don't have to break it  
04:02:19 21 down.

04:02:20 22 MR. BUTERMAN: Well, except for the fact, Your  
04:02:21 23 Honor, that we know that there is duplication. Steves has  
04:02:24 24 admitted that they have to make an election of remedies,  
04:02:26 25 and there's no way for that to occur without having some

04:02:31 1 level of particularities.

04:02:32 2 But what we're really concerned about, Your Honor, is  
04:02:35 3 if, for instance, the Fourth Circuit were to say that the  
04:02:40 4 overcharge claims could have been considered antitrust  
04:02:46 5 violations, but the quality claims could not have been.  
04:02:51 6 If you do not have that breakdown, Your Honor,  
04:02:54 7 respectfully, what the Fourth Circuit is going to do is  
04:02:56 8 send us back for a remand, as opposed to --

04:02:59 9 THE COURT: No. The Fourth Circuit will affirm  
04:03:00 10 it on the basis, if there is a basis, to affirm it.  
04:03:04 11 That's what generally happens.

04:03:06 12 Can they send it back for a remand? Sure.

04:03:08 13 MR. BUTERMAN: But this will avoid that.

04:03:08 14 THE COURT: But in the case -- if you'll read  
04:03:12 15 the Fourth Circuit cases on verdict -- if there's a basis  
04:03:15 16 upon which to affirm the verdict, they're going to affirm  
04:03:17 17 it if they find there's a basis to affirm it, even if  
04:03:21 18 there's one basis that would not fly. That's the general  
04:03:24 19 approach the Court has taken over the years.

04:03:27 20 MR. BUTERMAN: Absolutely, Your Honor. But what  
04:03:28 21 we're concerned about is a situation where they believe  
04:03:31 22 that there is an infection. And if you spell it out this  
04:03:35 23 way --

04:03:36 24 THE COURT: An inflection?

04:03:38 25 MR. BUTERMAN: Infection. Infection. In other

04:03:38 1 words --

04:03:39 2 THE COURT: That -- what? That what infected  
04:03:43 3 what?

04:03:44 4 MR. BUTERMAN: That the antitrust claims include  
04:03:46 5 breach claims that should not have been included. By  
04:03:48 6 doing it this way, it provides the -- excuse me, Your  
04:03:53 7 Honor. By doing it this way, it provides the Fourth  
04:03:55 8 Circuit with a clear understanding of what happened and it  
04:03:58 9 allows them to just excise the inappropriate damages, as  
04:04:02 10 opposed to having to remand.

04:04:08 11 THE COURT: All right. What do you say?

04:04:11 12 MR. MACH: We agree with the view that you  
04:04:12 13 expressed Your Honor; that the general verdict form is  
04:04:16 14 both simpler for the jury and actually less likely to  
04:04:19 15 raise complications.

04:04:20 16 We don't understand -- we think the likelihood that  
04:04:24 17 it would be necessary to divide overcharge damages other  
04:04:29 18 than Madison and Monroe from overcharge damages for  
04:04:33 19 Madison and Monroe, for example, to be extremely slim and  
04:04:37 20 that the most likely outcome is that the jury is confused  
04:04:39 21 by a more --

04:04:41 22 THE COURT: Isn't your proof tied differently?  
04:04:43 23 I mean, don't you have proof for the damages of Madison  
04:04:48 24 and Monroe and proof for the other ones?

04:04:52 25 MR. MACH: We do, Your Honor.



04:04:53 1 THE COURT: Yeah. I mean, that's how the case  
04:04:55 2 was presented to the jury. Mr. Buterman actually makes a  
04:05:01 3 fairly reasonable point about making it clear what it is  
04:05:05 4 that the jury did. And I don't see any -- I don't -- I'm  
04:05:11 5 not sure there's any harm in doing it that way. What's  
04:05:14 6 the harm?

04:05:15 7 MR. MACH: The harm is simply in making the  
04:05:17 8 verdict form more complicated and burdensome for the jury  
04:05:21 9 than it needs to be, Your Honor.

04:05:27 10 MR. BUTERMAN: Your Honor, it's essentially  
04:05:28 11 creating two different verdict forms, one that's  
04:05:31 12 specialized for the breach claims but one that's general  
04:05:33 13 for the antitrust claims.

04:05:34 14 THE COURT: That and a nickel will get you a  
04:05:38 15 Coke.

04:05:38 16 MR. BUTERMAN: I don't know where I can get a  
04:05:40 17 Coke for a nickel anymore, Your Honor.

04:05:42 18 THE COURT: That's the point. That doesn't --  
04:05:44 19 that doesn't make any difference. Because the reason --  
04:05:46 20 the reason that's the case is because the contract proofs  
04:05:55 21 and claims are so convoluted -- I mean complex that -- and  
04:06:00 22 the damage issues respecting them are somewhat different.  
04:06:04 23 So as a contract issue, they have to be that way.

04:06:08 24 However, I don't know that there's any harm in doing  
04:06:11 25 this, and I think probably it's just as well to go on and

04:06:14 1 get the record cleaned up and straight on it. So I'm  
04:06:17 2 inclined to agree to do what -- what Jeld-Wen suggests.

04:06:24 3 Is there any reason -- any other reason that's not  
04:06:27 4 been said? All right. This will be the one we'll use,  
04:06:33 5 then.

04:06:34 6 MR. BUTERMAN: Thank you, Your Honor.

04:06:35 7 MR. DANE: Your Honor, we might just suggest a  
04:06:37 8 change in the formatting of this to simplify it. Instead  
04:06:40 9 of repeating each time as to Count I, et cetera, et  
04:06:44 10 cetera, start out saying, "As to Count I, we, the jury,  
04:06:49 11 find, by a preponderance of the evidence, that the  
04:06:51 12 plaintiff is entitled to damages in the amount of X  
04:06:55 13 dollars for antitrust injuries already sustained as a  
04:06:58 14 result of, colon." And then we could just have a list of  
04:07:03 15 each of the conduct that's broken out here and a line next  
04:07:09 16 to it.

04:07:09 17 So there would be, 1, Jeld-Wen is overcharging Steves  
04:07:13 18 for door skins other than Madison and Monroe. 2, Jeld-Wen  
04:07:16 19 is overcharging Steves for Madison and Monroe door skins.  
04:07:16 20 3, Jeld-Wen shipping defective door skins to Steves,  
04:07:22 21 failing to reimburse Steves for those door skins. 4,  
04:07:25 22 Jeld-Wen is refusing to reimburse Steves for the cost of  
04:07:29 23 doors that are incorporated -- that incorporate defective  
04:07:33 24 door skins. It just simplifies it.

04:07:35 25 MR. BUTERMAN: Your Honor, I don't actually

04:07:36 1 think it does simplify it because --

04:07:38 2 THE COURT: Well, then you have to have  
04:07:39 3 something for we award damages for it.

04:07:42 4 MR. BUTERMAN: Yeah.

04:07:42 5 THE COURT: You have to repeat the whole thing  
04:07:43 6 again for damages, it looks to me like.

04:07:47 7 MR. DANE: Well, it would keep the damages in  
04:07:49 8 the amount of the dollars -- yeah. I'm sorry. You're  
04:07:53 9 right, Your Honor. You're absolutely right.

04:07:55 10 It would be taken -- the blank space would be taken  
04:07:59 11 out of the preamble, and it would be put next to each of  
04:08:02 12 these. And I didn't say this, and I meant to include  
04:08:05 13 this, in the top part, it is entitled, "The damages in the  
04:08:10 14 amount of" --

04:08:11 15 THE COURT: Why don't you do this. Why don't  
04:08:13 16 you take what you think is a good idea and take it up with  
04:08:15 17 Mr. Buterman. And I think whatever makes it easier for  
04:08:18 18 the jury is what we ought to do. But the concept that is  
04:08:22 19 expressed in Jeld-Wen's proffer I think is the right one.

04:08:28 20 MR. DANE: Okay. We'll do that, Your Honor.

04:08:31 21 MR. MACH: Thank you, Your Honor.

04:08:31 22 THE COURT: But if you want to, in the  
04:08:33 23 morning -- I guess if you got something you can agree on  
04:08:35 24 that -- or if you can't agree on it, then at least -- I  
04:08:39 25 mean, here's what -- then at least let me have something.

04:08:43 1 But if I were the person arguing this case, I might  
04:08:47 2 want to have certainty as to what the verdict form was  
04:08:51 3 going to be so that I could use the verdict form in my  
04:08:54 4 argument and say, I want you to fill it in -- I mean, I  
04:08:58 5 don't -- I didn't really ever really use that technique.  
04:09:03 6 But a lot of lawyers do use it. And I don't know whether  
04:09:06 7 they are going to be using it or not. So I'd run this by  
04:09:08 8 the people who are lawyering --

04:09:11 9 MR. DANE: We'll do.

04:09:11 10 THE COURT: -- arguing the case. I know who's  
04:09:14 11 lawyering. All of you are. Arguing the case. Okay?

04:09:18 12 MR. MACH: Yes, Your Honor.

04:09:19 13 MR. BUTERMAN: Thank you, Your Honor.

04:09:20 14 THE COURT: All right. Now -- all right.

04:09:31 15 Mr. Martecchini will send this to you when we get -- when  
04:09:37 16 we get -- can you work on these?

04:09:46 17 All right. Do you want to do your Rule 50 motions  
04:09:49 18 now? Steves filed one. Apparently they didn't think we  
04:09:57 19 had enough to do so they wanted one.

04:10:01 20 MR. BUTERMAN: I confess. I don't have it, Your  
04:10:02 21 Honor.

04:10:03 22 THE COURT: Have you read it yet?

04:10:05 23 MR. BUTERMAN: No.

04:10:06 24 THE COURT: Why not?

04:10:08 25 MR. BUTERMAN: Well, I've been with Your Honor.

04:10:09 1 THE COURT: How do you propose that we proceed  
04:10:10 2 on this, given that it would be a reasonable thing to do  
04:10:14 3 to give them a chance to read it before they have to argue  
04:10:16 4 it?

04:10:18 5 MR. MACH: That sounds reasonable.

04:10:20 6 THE COURT: Or prepare a response. I mean,  
04:10:21 7 it's -- how do you want to proceed, Mr. Buterman? I have  
04:10:26 8 a jury coming in here at 9:30 in the morning.

04:10:29 9 MR. BUTERMAN: Yes, Your Honor. I certainly  
04:10:32 10 would like to read it, and then I think preparing a  
04:10:38 11 response would be ideal. I can probably get a response --  
04:10:45 12 I can get a response in tonight. That's for sure, Your  
04:10:48 13 Honor. But I don't know when we would have time to argue  
04:10:52 14 this, if you want to do it --

04:10:56 15 THE COURT: Well, I think we have to do this one  
04:10:59 16 before because of the instructions on the efficiencies.

04:11:02 17 MR. BUTERMAN: Yeah.

04:11:04 18 THE COURT: That's the only -- I mean, the rest  
04:11:06 19 of the things -- actually, you know, in the modern Rule 50  
04:11:13 20 world, if you submit a motion and it's not ruled upon,  
04:11:18 21 it's just taken under consideration so that it can be  
04:11:22 22 dealt with later on, which is the practice that had come  
04:11:28 23 to pass over the years anyway. I don't know exactly when  
04:11:32 24 that change was made, but it's not been too long ago.

04:11:38 25 So everything else we're doing could be done that

04:11:41 1 way. I'm not saying that's the way to do it, but it could  
04:11:45 2 be done that way. But the efficiencies, I think, presents  
04:11:48 3 a problem because of your defense. Your people are going  
04:11:52 4 to want to argue that, right? And you want to know  
04:11:55 5 whether -- and then I can't be in a position of later  
04:11:58 6 telling the -- you know, the jury they can't do it, they  
04:12:02 7 can't consider it. So how do you think we ought to  
04:12:04 8 proceed?

04:12:05 9 MS. ECKSTEIN: One option is the jury is coming  
04:12:07 10 in at 9:30. We could come in at 9 and argue that before  
04:12:10 11 we start and not take up their time.

04:12:15 12 MR. BUTERMAN: That's fine with us, Your Honor.  
04:12:17 13 I guess the only thing I'm wondering is do we take  
04:12:20 14 that to mean that Your Honor is taking our entire Rule 50  
04:12:24 15 motion under advisement?

04:12:26 16 THE COURT: No. I'm going to listen to it in  
04:12:27 17 just a minute.

04:12:28 18 MR. BUTERMAN: Oh, okay.

04:12:29 19 THE COURT: I'm just saying there's a difference  
04:12:31 20 between -- there's a difference in impact as to your  
04:12:36 21 motion and theirs.

04:12:38 22 MR. BUTERMAN: Yes, Your Honor.

04:12:40 23 THE COURT: Because yours presents issues that  
04:12:42 24 always could be presented to a jury and revisited in a  
04:12:46 25 post -- when it's heard post trial. Whereas theirs deals

04:12:49 1 with something that is something you really -- you say  
04:12:54 2 you're going to argue and they say they're not going to  
04:12:57 3 argue -- I mean they say it shouldn't go to the jury.

04:13:04 4 My inclination is to tell you that there has -- you  
04:13:08 5 haven't made the case for efficiencies, based on my  
04:13:12 6 understanding of the law of efficiencies. So I would like  
04:13:15 7 for you to be able to focus on that. And we will -- I  
04:13:21 8 think we'll just get here about quarter of 9. I'll hear  
04:13:26 9 you about quarter of 9 tomorrow.

04:13:28 10 MR. BUTERMAN: Yes, Your Honor.

04:13:32 11 THE COURT: Which one of you is taking my dog to  
04:13:34 12 day care?

04:13:37 13 All right. Then you're going to get me something  
04:13:42 14 when?

04:13:43 15 MR. BUTERMAN: We will get you something by --

04:13:46 16 THE COURT: I'm not -- I'm trying to -- you want  
04:13:49 17 to get it to me by 8 in the morning?

04:13:51 18 MR. BUTERMAN: Oh, absolutely, Your Honor.

04:13:52 19 THE COURT: I do think it's all right to sleep  
04:13:54 20 once in a while.

04:13:56 21 MR. BUTERMAN: Yeah. That will be next week,  
04:13:59 22 Your Honor.

04:14:04 23 THE COURT: All right. Let's consider the  
04:14:12 24 motions at this juncture. Are you going to argue?

04:14:18 25 MR. BUTERMAN: I will be addressing parts of

04:14:19 1 this, and Ms. Maltas will be addressing parts of this as  
04:14:23 2 well.

04:14:24 3 THE COURT: All right.

04:14:25 4 MR. BUTERMAN: Would Your Honor prefer that I go  
04:14:26 5 to the podium or can I remain seated?

04:14:29 6 THE COURT: No. Come up here. It's easier for  
04:14:32 7 the -- you do you have the verdict form, the revised  
04:14:39 8 verdict form that they tendered over there? Did I give  
04:14:42 9 that to you as well as the instruction?

04:14:46 10 MR. MARTECCHINI: This one?

04:14:47 11 THE COURT: Yes. Okay. I just -- all right.

04:14:57 12 MR. BUTERMAN: Thank you, Your Honor. As Your  
04:15:01 13 Honor is aware, Jeld-Wen has presented a Rule 50 motion on  
04:15:08 14 a number of issues. I'm going to handle the first few in  
04:15:12 15 order and then pass the baton to Ms. Maltas.

04:15:17 16 THE COURT: All right.

04:15:17 17 MR. BUTERMAN: The first issue, Your Honor, is  
04:15:19 18 that we believe that at this point it is clear that  
04:15:24 19 Jeld-Wen is entitled to judgment as a matter of law on  
04:15:29 20 Steves' antitrust claims under Section 4 of the Clayton  
04:15:32 21 Act. And the reason that we believe that is so is because  
04:15:37 22 Steves has not presented evidence that establishes that  
04:15:41 23 the merger caused Steves' claimed injuries, nor that it  
04:15:46 24 measured antitrust damages.

04:15:48 25 And so the issue here, Your Honor, is whether the



04:15:52 1 evidence demonstrates impact or a cognizable measure of  
04:15:58 2 damages under Section 4. And we submit that those are two  
04:16:01 3 separate things, Your Honor, though very much closely  
04:16:04 4 related.

04:16:06 5 The evidence is clear that Steves has not presented a  
04:16:10 6 methodology that the jury could use to find that the  
04:16:13 7 merger itself harmed Steves or to award antitrust damages.  
04:16:21 8 And in that regard, Your Honor, I think that the evidence  
04:16:24 9 that we saw earlier today from Mr. Tucker, actually right  
04:16:29 10 at the end of his -- his rebuttal testimony, is the best  
04:16:37 11 proof of that. Mr. Tucker said, quite clearly, that he  
04:16:41 12 did not consider, either in his overcharge damages or in  
04:16:48 13 his quality damages, the defect claims, a consideration of  
04:16:53 14 what the actual world is as compared to a but-for world  
04:17:00 15 where the merger had never occurred.

04:17:03 16 And the reason that we know that is because both in  
04:17:07 17 his -- because in his overcharge damages, for instance, he  
04:17:12 18 includes Towanda. His defects damages are infected by  
04:17:18 19 this problem in two ways both because, again, he includes  
04:17:22 20 defect from Towanda, but also because we asked him  
04:17:27 21 specifically whether he had compared what the defect rate  
04:17:32 22 would have been if the merger had never happened, what  
04:17:36 23 Jeld-Wen would have reimbursed Steves for, in terms of  
04:17:43 24 defective door skins, if the merger had never happened,  
04:17:46 25 and there simply is no evidence whatsoever that he did

04:17:50 1 that.

04:17:52 2 Now, this also is an impact issue because we heard  
04:17:55 3 the testimony of Professor Shapiro, and Professor Shapiro,  
04:17:59 4 what he said is that he examined a pre-merger world and a  
04:18:03 5 post-merger world. But respectfully, Your Honor, that is  
04:18:07 6 not an acceptable response to this issue. And the reason  
04:18:11 7 why it is not an acceptable response to the issue is  
04:18:16 8 because at the end of the day here, all of Steves' damages  
04:18:21 9 are -- the overcharge damages and the defective damages,  
04:18:28 10 they are all damages under the contract. That's what  
04:18:30 11 we've seen from the jury form.

04:18:33 12 And because they are damages that flow from the  
04:18:36 13 contract, you can't look and create a but-for world that  
04:18:41 14 also includes Towanda in it. That's the problem that  
04:18:45 15 we've raised now a couple of times, and we think that the  
04:18:48 16 evidence is clear that there just --

04:18:51 17 THE COURT: You say that as if it's sort of a  
04:18:54 18 foregone conclusion that I ought to understand why it's  
04:18:58 19 so. And I don't. I don't understand why consideration of  
04:19:06 20 Towanda necessarily leads -- in his calculations  
04:19:13 21 necessarily leads to the result you're arguing for. Can  
04:19:16 22 you help me?

04:19:17 23 MR. BUTERMAN: Absolutely, Your Honor. So let's  
04:19:19 24 focus on the overcharge damages. I think that's the --  
04:19:23 25 just a very simple, straightforward one. And we heard

04:19:27 1 Professor Shapiro say earlier that in antitrust analysis,  
04:19:32 2 you compare a but-for world, a world where there is no  
04:19:38 3 merger, versus the world that exists today. The problem  
04:19:42 4 is that when Professor -- excuse me -- that when  
04:19:45 5 Mr. Tucker went and looked at his but-for world, there  
04:19:49 6 was -- he didn't do a but-for world. What he examined was  
04:19:53 7 just the difference between what Jeld-Wen should have  
04:19:57 8 charged Steves under the contract versus what Jeld-Wen  
04:20:01 9 actually charged Steves under the contract. And in both  
04:20:04 10 of those calculations, you have the inclusion of the  
04:20:09 11 Towanda plant, meaning that the merger has occurred.  
04:20:12 12 That's why these just cannot be considered antitrust  
04:20:15 13 damages.

04:20:16 14 If Mr. Tucker wanted to calculate antitrust damages,  
04:20:21 15 what he would have had to look at is the overcharges that  
04:20:26 16 Jeld-Wen made under the contract versus the overcharges  
04:20:30 17 that would have existed if the merger had never happened.  
04:20:33 18 And so he would have had to have taken out Towanda. And  
04:20:37 19 he, by his own admission, did not do that. Therefore,  
04:20:41 20 these are not antitrust damages.

04:20:42 21 And so the jury -- the only number that the jury has  
04:20:46 22 been presented with is this figure of antitrust -- is a  
04:20:49 23 figure of contract damages, which cannot constitute  
04:20:52 24 antitrust damages.

04:20:55 25 And, again, when we look at -- the same thing

occurs -- or the same problem occurs --

THE COURT: Why do you say there's no impact?

MR. BUTERMAN: Well, because --

THE COURT: You're flipping a bunch of terms around, and you're really not explaining to me why.

What's an antitrust impact?

MR. BUTERMAN: Well, that's an effect of the merger on Steves, Your Honor.

THE COURT: Right. And you're telling me there's no evidence from which the jury could find that the merger did not have -- or had an effect on Steves?

MR. BUTERMAN: Yes, Your Honor, because of the way that this has been done. It's not that they couldn't have. I want to be very, very clear about this.

THE COURT: Not that who couldn't have?

MR. BUTERMAN: It's not that Steves couldn't have presented an impact argument -- a sufficient impact argument. And, again, with damages, we're not saying that Steves couldn't have made a proper damages calculation. It's just that they did not do it. They never said to the jury, This is the level of defects of -- for instance, quality. This is the level of quality that existed -- that exists today, and here was before the merger, and this change is attributable to the merger.

Professor Shapiro specifically testified under oath

04:22:12 1 that he actually did not calculate any difference -- do  
04:22:17 2 any analysis of the effects of the merger on quality. And  
04:22:20 3 we could get that statement, but I don't think it's  
04:22:22 4 contested.

04:22:23 5 THE COURT: No. He just did price.

04:22:25 6 MR. BUTERMAN: Okay. Well, then --

04:22:27 7 THE COURT: I mean, that's what he said, wasn't  
04:22:29 8 it?

04:22:30 9 MR. BUTERMAN: Yeah. So I think, then, we're in  
04:22:32 10 agreement that they have not presented an expert opinion  
04:22:34 11 on any antitrust impact with respect --

04:22:37 12 THE COURT: Do they have to?

04:22:38 13 MR. BUTERMAN: Your Honor --

04:22:39 14 THE COURT: They can't rely on the testimony of  
04:22:43 15 lay witnesses?

04:22:44 16 MR. BUTERMAN: Well, how does it go to the jury?  
04:22:46 17 How is the jury then supposed to calculate damages?

04:22:51 18 THE COURT: No. No. No. I'm talking about the  
04:22:52 19 impact. The fact of the impact and the quantum of the  
04:22:57 20 damages are not the same thing.

04:22:59 21 MR. BUTERMAN: I don't think that there's any  
04:23:00 22 basis for the jury to conclude what Steves is trying to  
04:23:03 23 have them conclude with respect to defects. I don't think  
04:23:06 24 that there's a basis for the jury to conclude that the  
04:23:09 25 merger caused any problems. I don't think there's any

04:23:13 1 evidence of that.

04:23:14 2           What we have is we have defects. But who was the  
04:23:17 3 witness who said, You know what. Here's what happened.  
04:23:20 4 The quality was good. Jeld-Wen acquired CMI, and because  
04:23:23 5 of that, the quality went down?

04:23:25 6           We don't have any evidence of that at all.

04:23:30 7           THE COURT: Do you have to have direct testimony  
04:23:31 8 of that or can it be presented by circumstantial evidence?

04:23:34 9           MR. BUTERMAN: I'm not sure that they have  
04:23:36 10 presented it either way, Your Honor.

04:23:37 11           THE COURT: But would you like to answer that  
04:23:39 12 question, though?

04:23:41 13           MR. BUTERMAN: I'm sorry. Could they present it  
04:23:42 14 by --

04:23:43 15           THE COURT: The question is do they have to have  
04:23:45 16 direct evidence of that -- of the impact, or can it be  
04:23:50 17 proved by circumstantial evidence combined with some  
04:23:53 18 evidence?

04:23:54 19           MR. BUTERMAN: I believe that it certainly --

04:23:56 20           THE COURT: Excuse me. Lay opinion evidence  
04:24:02 21 of --

04:24:03 22           MR. BUTERMAN: I mean, in theory, I don't see  
04:24:04 23 why it couldn't be done by circumstantial evidence with  
04:24:07 24 something else. But, again, I'm just not sure that they  
04:24:11 25 have done it either way. But I -- this is an argument

04:24:16 1 that we've presented before, Your Honor, and Your Honor  
04:24:19 2 has addressed it. I think that what's the different part  
04:24:23 3 now, though, is with respect to the -- the damages part of  
04:24:26 4 this where I think the evidence now is very clear that  
04:24:30 5 regardless of what anyone thinks about the impact  
04:24:34 6 question, there is no damages figure to present to this  
04:24:37 7 jury on either overcharge or on defects that constitutes  
04:24:44 8 a -- a -- a measure of antitrust injuries.

04:24:49 9 THE COURT: Right.

04:24:50 10 MR. BUTERMAN: And, Your Honor, we --

04:24:51 11 THE COURT: All right. Are you finished with  
04:24:52 12 that one?

04:24:53 13 MR. BUTERMAN: Yes.

04:24:54 14 THE COURT: All right. Let me hear from the  
04:24:55 15 other side, then.

04:25:47 16 MR. MACH: So, Your Honor, this argument is  
04:25:48 17 essentially a reprize of issues that were raised at the  
04:25:51 18 motion to dismiss stage, and they should be addressed in  
04:25:54 19 the same way now as they were then.

04:25:57 20 THE COURT: Well, not quite, because one  
04:26:00 21 considers evidence that's been presented at the trial at  
04:26:03 22 this juncture and -- let's just go ahead and stop and  
04:26:20 23 switch.

04:26:20 24 MR. MACH: Thank you.

04:26:20 25 (Recess taken.)

04:28:22PM 1 THE COURT: Where's the evidence that there was an  
04:28:24PM 2 impact, antitrust impact? What is that evidence? Tell me what  
04:28:29PM 3 you think it is.

04:28:29PM 4 MR. MACH: So the analysis of whether there were  
04:28:32PM 5 anticompetitive effects of the merger are put forth partly by  
04:28:37PM 6 Dr. Shapiro and partly by Steves' fact witnesses, Your Honor.

04:28:41PM 7 THE COURT: That's a general statement. I want to  
04:28:44PM 8 know exactly what proof you've got.

04:28:46PM 9 MR. MACH: Professor Shapiro explained that he saw  
04:28:50PM 10 anticompetitive impact in the form of increases in price, and  
04:28:53PM 11 Steves' witnesses, including Sam Steves, Edward Steves, and Mr.  
04:28:57PM 12 Gartner, talked about impacts that they saw in terms of quality  
04:29:02PM 13 and in-plant damages due to the reduction in packaging, and  
04:29:07PM 14 this goes, I think, to the fundamental flaw of the approach --

04:29:12PM 15 THE COURT: How is in-plant damage possibly an impact  
04:29:16PM 16 from an anticompetitive effect of the merger? How could that  
04:29:22PM 17 be?

04:29:22PM 18 MR. MACH: It would be in the sense that the  
04:29:25PM 19 elimination of the packaging, which contributes to the in-plant  
04:29:29PM 20 damage, is an alternative way of increasing the price of the  
04:29:34PM 21 product through a degradation of its quality --

04:29:37PM 22 THE COURT: Who said that? Who said that? Nobody  
04:29:39PM 23 said that.

04:29:41PM 24 MR. MACH: I don't think anybody said precisely that.

04:29:44PM 25 THE COURT: Then you're missing some evidence. Do



04:29:47PM 1 you know what the general law is about taking delivery of a  
04:29:52PM 2 product and what happens to the risk, loss, and damage? Where  
04:29:56PM 3 does it shift?

04:29:56PM 4 MR. MACH: I believe it shifts upon delivery.

04:29:59PM 5 THE COURT: And it can ship FOB. There are a lot of  
04:30:04PM 6 places, but at a bear minimum, once you're driving it around  
04:30:09PM 7 your plant, how is that an antitrust impact?

04:30:13PM 8 MR. MACH: It would be an antitrust impact in the  
04:30:16PM 9 sense that there are negative results for Steves as a result of  
04:30:19PM 10 the reduction in packaging if that originated from the merger.  
04:30:23PM 11 Now, I will concede --

04:30:24PM 12 THE COURT: What evidence is there it did originate  
04:30:27PM 13 from the merger?

04:30:28PM 14 MR. MACH: That would be testimony from Mr. Gartner,  
04:30:31PM 15 for example.

04:30:32PM 16 THE COURT: What did he say?

04:30:33PM 17 MR. MACH: He said that the packaging was more  
04:30:37PM 18 complete before the merger and that it was degraded and reduced  
04:30:37PM 19 after the merger.

04:30:38PM 20 THE COURT: That's temporal.

04:30:40PM 21 MR. MACH: It's circumstantial, correct. I will  
04:30:45PM 22 concede, Your Honor, that these --

04:30:47PM 23 THE COURT: Let's put the in-plant damage aside,  
04:30:50PM 24 because I don't think there's any merit to the whole claim.

04:30:52PM 25 MR. MACH: I was going to suggest the same thing.

04:30:54PM 1 I'll do that, Your Honor.

04:30:56PM 2 THE COURT: Steves testified as to quality  
04:30:59PM 3 diminution.

04:30:59PM 4 MR. MACH: Correct, Your Honor.

04:31:00PM 5 THE COURT: And price?

04:31:02PM 6 MR. MACH: Correct, Your Honor.

04:31:03PM 7 THE COURT: Why was it caused by the merger?

04:31:06PM 8 MR. MACH: For the purposes of price, you look at the  
04:31:09PM 9 analysis that was provided by Professor Shapiro who analyzed  
04:31:14PM 10 changes in price and the potential causes of those changes in  
04:31:19PM 11 price, and under his economic analysis, he concluded that there  
04:31:23PM 12 were no other causes for those changes in price that he could  
04:31:27PM 13 identify.

04:31:27PM 14 That is, of course, the subject of intense debate  
04:31:31PM 15 with their expert. That is sufficient to establish antitrust  
04:31:37PM 16 injury. What Jeld-Wen is raising really goes to the quantum of  
04:31:42PM 17 damages, and distinction between the two is important, because  
04:31:45PM 18 the proof necessary on the quantum of damages is greatly  
04:31:50PM 19 relaxed once the existence of injury is established.

04:31:53PM 20 And Mr. Tucker and Mr. Kaplan can have disagreements  
04:31:58PM 21 about the proper quantum of those damages. That question has  
04:32:02PM 22 been the subject of extensive testimony and cross-examination,  
04:32:07PM 23 and, ultimately, the issue that Jeld-Wen is raising is a very  
04:32:13PM 24 particular and small aspect of Mr. Tucker's overall  
04:32:16PM 25 presentation of his analysis, and an important observation is

04:32:23PM 1 that I don't believe Mr. Kaplan, or anyone else from Jeld-Wen,  
04:32:27PM 2 has ever explained why that supposed error would actually  
04:32:32PM 3 impact the damages or how it would impact the damages that Mr.  
04:32:35PM 4 Tucker is providing.

04:32:36PM 5 THE COURT: What error are you talking about?

04:32:38PM 6 MR. MACH: The inclusion of Towanda figures in  
04:32:41PM 7 certain damages calculations. Now, if it's -- if it's  
04:32:46PM 8 possible, if they think they have evidence that that should  
04:32:49PM 9 change the size of the damages that were presented by Mr.  
04:32:52PM 10 Tucker, that's an issue to be addressed -- that should be  
04:32:57PM 11 addressed through the examinations of Mr. Tucker, Mr. Kaplan,  
04:32:59PM 12 and ultimately decided by the jury.

04:33:08PM 13 THE COURT: Anything else, Mr. Buterman, on that  
04:33:10PM 14 point?

04:33:13PM 15 MR. BUTERMAN: Yes, Your Honor, very briefly. I  
04:33:18PM 16 don't think that there's any dispute here that in an antitrust  
04:33:21PM 17 case, proof of impact must also include proof of the  
04:33:26PM 18 competitive baseline that shows that the plaintiff paid higher  
04:33:29PM 19 prices than it would have paid in the absence of the conduct  
04:33:32PM 20 alleged to violate the antitrust laws.

04:33:34PM 21 Respectfully, I do not believe that there's any  
04:33:37PM 22 evidence that shows that this antitrust violation that's being  
04:33:42PM 23 alleged caused the impact that Steves is saying that they  
04:33:48PM 24 suffered. It's all tied to the contract, and they have not  
04:33:51PM 25 presented anything.

04:33:52PM 1 As Your Honor said, what they have, at best, is  
04:33:55PM 2 temporal, a temporal connection, but it's even weak at that,  
04:33:59PM 3 because, as we know, almost all of Steves' allegations concern  
04:34:03PM 4 what happened when Mr. Hachigian arrived.

04:34:05PM 5 If this was a plan to use a pricing power that was  
04:34:11PM 6 gained from the merger in order to affect Steves, why, then, in  
04:34:16PM 7 the first year, did Jeld-Wen lower prices to Steves? It  
04:34:20PM 8 doesn't -- it just doesn't make any sense, Your Honor. This is  
04:34:23PM 9 all about the contract. It has always been all about the  
04:34:26PM 10 contract, and, again, I think --

04:34:28PM 11 THE COURT: Isn't their theory that Onex put in a  
04:34:34PM 12 softy, and he cut a sweetheart deal for the Steves, and that  
04:34:41PM 13 wasn't what they were looking for, so then they got the hatchet  
04:34:45PM 14 man? Hachigian. Hatchet man. I think that's how they said  
04:34:53PM 15 it, too.

04:34:54PM 16 MR. BUTERMAN: Your Honor, even if that is the  
04:34:56PM 17 theory, I'm not sure how that explains how Steves --

04:35:00PM 18 THE COURT: Explains the delay.

04:35:02PM 19 MR. BUTERMAN: I'm not sure it explains the link to  
04:35:06PM 20 the merger. I think Mr. Hachigian's testimony on this was very  
04:35:09PM 21 clear.

04:35:09PM 22 THE COURT: They intended to do it all along.

04:35:11PM 23 MR. BUTERMAN: Your Honor, I mean, if they --

04:35:14PM 24 THE COURT: They just didn't implement it right.

04:35:17PM 25 MR. BUTERMAN: I don't think there's any evidence of

04:35:19PM 1 that, Your Honor, and if they did, why didn't they do it right  
04:35:22PM 2 away? You're talking about effects of a merger years  
04:35:25PM 3 afterwards. Why weren't there effects immediately?

04:35:29PM 4 THE COURT: I think the answer is because of the way  
04:35:32PM 5 they interpreted the contract, isn't it? They interpreted the  
04:35:37PM 6 contract in such a way, while Orsino was there, that the  
04:35:41PM 7 impacts could not be felt. They were felt once Hachigian got  
04:35:47PM 8 there.

04:35:50PM 9 MR. BUTERMAN: Doesn't that suggest this is a  
04:35:52PM 10 Hachigian issue and not an antitrust issue? Again, what we  
04:35:56PM 11 have to ask ourselves, and what the jury ultimately is looking  
04:36:00PM 12 at, is whether anything that's been alleged in this case would  
04:36:03PM 13 have happened any differently if the merger had never happened,  
04:36:06PM 14 and I just don't think there's any evidence on that.

04:36:09PM 15 And, Your Honor, on the quality thing, I think that  
04:36:12PM 16 Mr. Mach acknowledged that Professor Shapiro hasn't done this  
04:36:17PM 17 but-for analysis on quality. So we respectfully submit that  
04:36:22PM 18 certainly that shouldn't be part of the antitrust claim.

04:36:25PM 19 THE COURT: All right, the next point?

04:36:28PM 20 MR. BUTERMAN: Your Honor, the next one I'll keep  
04:36:33PM 21 very, very short. That's on the claim for future lost profits,  
04:36:40PM 22 and the point that we are making there is that that claim  
04:36:44PM 23 suffers from the same defect that the other claims suffer from,  
04:36:50PM 24 although I will acknowledge that it's more complicated with  
04:36:56PM 25 respect to Mr. Tucker's lost profits analysis.

04:37:00PM 1 But, as Mr. Tucker said -- I believe it actually was  
04:37:04PM 2 the last question that I asked him -- his costs of sales  
04:37:08PM 3 included for 2015, which he uses as the baseline for his lost  
04:37:14PM 4 profits calculation, that cost of sales included all of Steves'  
04:37:20PM 5 costs of sales which included the Towanda plant. And so,  
04:37:24PM 6 therefore --

04:37:25PM 7 THE COURT: Is your position that you cannot -- that  
04:37:31PM 8 if you acquire a plant, somebody's assets, that it is  
04:37:37PM 9 impossible, once you integrate those assets, to have a  
04:37:46PM 10 violation of the Clayton Act?

04:37:48PM 11 MR. BUTERMAN: Absolutely not, Your Honor.

04:37:50PM 12 THE COURT: Because your argument basically seems to  
04:37:53PM 13 me to be that because he considered -- because there was  
04:38:01PM 14 consideration of the Towanda plant output in the costs and so  
04:38:09PM 15 forth, which was obtained by virtue of the merger, that you can  
04:38:15PM 16 never have an analysis about what the world would look like but  
04:38:21PM 17 for the merger, before the merger, or after the merger, thereby  
04:38:28PM 18 insulating you forever for proof of any anticompetitive effect.

04:38:35PM 19 MR. BUTERMAN: Your Honor, we absolutely do not  
04:38:37PM 20 believe that.

04:38:38PM 21 THE COURT: What would he have had to do? What would  
04:38:42PM 22 Mr. Tucker had to have done; take out all of the Towanda  
04:38:46PM 23 information from his data?

04:38:48PM 24 MR. BUTERMAN: From his 2015 data that he used to  
04:38:51PM 25 calculate lost profits if he was going to do it via lost

04:38:55PM 1 profits. There are -- and I believe Mr. Tucker testified to  
04:38:58PM 2 this. There are multiple ways to reach what he ended up  
04:39:03PM 3 reaching. He did it through a lost profits analysis. You  
04:39:06PM 4 could have done a discounted cash flow analysis. There are  
04:39:09PM 5 many ways to do it, some of which would have been much, much  
04:39:12PM 6 easier in terms of stripping out Towanda.

04:39:16PM 7 But we do believe that with respect to the  
04:39:18PM 8 overcharge, with respect to defects, and with respect to lost  
04:39:21PM 9 profits, it was absolutely possible for Mr. Tucker to strip out  
04:39:26PM 10 the effects of the merger.

04:39:28PM 11 THE COURT: How? What evidence is there from your  
04:39:30PM 12 side about how that would have been done? I didn't hear that,  
04:39:35PM 13 and I confess that all those witnesses are a lot smarter than I  
04:39:42PM 14 am, so I may have missed what they were saying. I know you all  
04:39:46PM 15 know antitrust law better than I do, but I didn't hear anybody  
04:39:49PM 16 say that.

04:39:50PM 17 MR. BUTERMAN: I think you are correct, Your Honor,  
04:39:54PM 18 that nobody said, here's how you do the numbers and here's the  
04:39:59PM 19 result if you do the analysis. We have not presented that. We  
04:40:04PM 20 felt that if Steves hadn't presented the proper analysis and  
04:40:08PM 21 one that should go to the jury, that it wasn't our  
04:40:12PM 22 responsibility to fix the problems for them.

04:40:13PM 23 THE COURT: But you all rolled the dice when you did  
04:40:16PM 24 that. You bear the consequences of doing it. That's a  
04:40:19PM 25 perfectly legitimate decision, but you bear the consequences of

04:40:22PM 1 it.

04:40:22PM 2 MR. BUTERMAN: Well, I don't know that because we  
04:40:25PM 3 pointed out the error in their ways of doing it but not fix the  
04:40:29PM 4 error for them that that means that they can present what they  
04:40:33PM 5 know to be an incorrect measure of antitrust damages to the  
04:40:37PM 6 jury. We believe that that would be wrong.

04:40:53PM 7 THE COURT: He says it all boils down to the fact  
04:40:58PM 8 that Towanda is considered in the midst of everything,  
04:41:03PM 9 Shapiro's analysis and Tucker's analysis.

04:41:06PM 10 MR. DANE: I'll address that, Your Honor.

04:41:08PM 11 THE COURT: How on earth can you construct a but-for  
04:41:12PM 12 world if you consider Towanda is his point; right? He is  
04:41:21PM 13 shaking his head yes.

04:41:23PM 14 MR. DANE: I'll try to explain, Your Honor.

04:41:27PM 15 THE COURT: Good.

04:41:27PM 16 MR. DANE: First of all, as the Court heard, Mr.  
04:41:31PM 17 Tucker was not attempting to say which buckets of the claims  
04:41:34PM 18 his damages calculations went to. He was just calculating the  
04:41:38PM 19 damages.

04:41:39PM 20 With regard to the lost profits calculation, he  
04:41:44PM 21 actually did take into account, and Mr. Buterman elicited this  
04:41:48PM 22 from him on his cross-examination, and I had him further  
04:41:52PM 23 testify to it today, he did take into account the merger, and  
04:41:57PM 24 he created a but-for scenario.

04:41:59PM 25 That's the reason that when he conducted his



04:42:01PM 1 analysis, he subtracted out all of the damages that we claim  
04:42:05PM 2 are attributable to the merger and that resulted from the  
04:42:09PM 3 increased market power that Jeld-Wen had as a result of the  
04:42:12PM 4 merger. He subtracted out those costs from his analysis. He  
04:42:17PM 5 also subtracted out the legal fees for this case assuming that  
04:42:21PM 6 in the but-for world where Jeld-Wen does not acquire  
04:42:24PM 7 CraftMaster, there will be healthy competition, and instead of  
04:42:28PM 8 the anticompetitive behavior of Jeld-Wen, there would have been  
04:42:32PM 9 honoring of the contract, there would have been honoring of the  
04:42:35PM 10 defect claims, and so he did take those costs out.

04:42:41PM 11 THE COURT: Is it a matter of honoring the contract,  
04:42:44PM 12 or is it a matter of somebody coming in and looking the  
04:42:47PM 13 contract in the eye and saying, what on earth does this thing  
04:42:51PM 14 provide, and, you know, we, in fact, have a different view of  
04:42:57PM 15 the contract based on this, and it's a good-faith view  
04:43:01PM 16 considering all the ambiguities? Why is that an antitrust  
04:43:04PM 17 issue as opposed to a simple  
04:43:08PM 18 whether-or-not-somebody-is-reading-the-contract-right issue?

04:43:10PM 19 MR. DANE: Your Honor, our position is that the  
04:43:12PM 20 evidence in this case indicates that this was not just a  
04:43:16PM 21 good-faith disagreement about the contract. This was a party  
04:43:19PM 22 that knew that it had the other contracting party between a  
04:43:23PM 23 rock and a hard place, because an important part of this  
04:43:27PM 24 contract, as Your Honor may recall, is when it was executed, if  
04:43:31PM 25 Jeld-Wen served notice of termination, that immediately

04:43:33PM 1 triggered the right for Steves to terminate the contract  
04:43:38PM 2 itself.

04:43:38PM 3 That was contemplating that there were other options,  
04:43:42PM 4 and that if Jeld-Wen jerked Steves around or did something  
04:43:47PM 5 inappropriate or served the notice of termination, that Steves  
04:43:49PM 6 could then go somewhere else. That didn't happen here.  
04:43:53PM 7 There's only one reason it didn't happen here: Because after  
04:43:58PM 8 the contract was signed, Jeld-Wen acquired market power,  
04:44:01PM 9 Jeld-Wen was the only possible source of door skins. So  
04:44:04PM 10 Jeld-Wen was able to do essentially anything it wanted to under  
04:44:08PM 11 the contract --

04:44:09PM 12 THE COURT: Did Jeld-Wen raise the prices after the  
04:44:12PM 13 merger?

04:44:14PM 14 MR. DANE: Yes, Your Honor.

04:44:15PM 15 THE COURT: When?

04:44:16PM 16 MR. DANE: It didn't do it immediately. For the  
04:44:21PM 17 first year, as Your Honor probably remembers, it had a very,  
04:44:26PM 18 very minor decrease. Second year it said it was going to  
04:44:29PM 19 provide a minor decrease, but it didn't. And then beginning  
04:44:32PM 20 the third year, it raised the prices, and then -- then it kept  
04:44:38PM 21 the prices flat which, in our view, when they had nine percent  
04:44:42PM 22 decrease in costs, is essentially the same as raising the  
04:44:46PM 23 prices, because under our interpretation of the contract and  
04:44:49PM 24 consistent with the testimony of Mr. Ambruz, and there is  
04:44:52PM 25 specific -- Ms. Maltas said there's no testimony about

04:44:55PM 1 discussions of the provisions. There's specific testimony in  
04:44:58PM 2 the record of Mr. Edward Steves saying he talked to Mr. Ambruz  
04:45:02PM 3 about that provision and what it meant, those prices should  
04:45:06PM 4 have gone down.

04:45:08PM 5 These are things that, in our view, the jury can  
04:45:10PM 6 reasonably conclude would not have incurred but for the merger  
04:45:13PM 7 and the enhanced market power that Jeld-Wen had. So it's  
04:45:16PM 8 incorrect to say, first of all, that Mr. Tucker did not back  
04:45:19PM 9 out or take into account the but-for world, because he  
04:45:23PM 10 certainly did.

04:45:24PM 11 The point that counsel is making is a different one.  
04:45:29PM 12 It is -- with regard to the prices that Steves paid for door  
04:45:37PM 13 skins, they're arguing that because Mr. Tucker looked at the  
04:45:44PM 14 prices that he calculated under the supply agreement, that that  
04:45:50PM 15 was somehow improper because, at the time, under the agreement,  
04:45:56PM 16 the acquisition had occurred, so Towanda was one of the  
04:45:58PM 17 facilities that was producing door skins for Jeld-Wen, and he  
04:46:02PM 18 shouldn't have kept it in the mix.

04:46:04PM 19 They have no opinion from anyone saying that that's  
04:46:09PM 20 inappropriate. Mr. Kaplan testified today he did no  
04:46:13PM 21 calculation or analysis of Mr. Tucker's numbers to show that  
04:46:19PM 22 there would not be injury if Towanda were backed out. The fact  
04:46:24PM 23 is, there are still damages if Towanda is backed out. They're  
04:46:29PM 24 not identical damages to Mr. Tucker, but they're still there.  
04:46:32PM 25 So as Mr. Mach said, this is absolutely not a question about

04:46:35PM 1 impact.

04:46:36PM 2 THE COURT: How does a jury determine what they are  
04:46:41PM 3 if they're backed out, if that's backed out?

04:46:43PM 4 MR. DANE: Well, Your Honor --

04:46:45PM 5 THE COURT: What exhibit has the figure on it, the  
04:46:47PM 6 dollar figure for the jury to determine anything?

04:46:51PM 7 MR. DANE: There is not one in the case, Your Honor.  
04:46:53PM 8 In our view, it's not appropriate to do that, to back out  
04:46:57PM 9 Towanda. I'm just saying what their position is, but even for  
04:47:00PM 10 their position, they don't have any evidence to suggest what  
04:47:03PM 11 that number is, and the reason -- Mr. Tucker was never asked  
04:47:08PM 12 why -- he testified that in his calculations, he thought that  
04:47:12PM 13 it was appropriate to keep Towanda in, and all of what we've  
04:47:17PM 14 heard here is just attorney argument from Mr. Buterman as to  
04:47:22PM 15 why Towanda supposedly shouldn't be in, and I respectfully  
04:47:27PM 16 disagree with Mr. Buterman. Because even if the merger had not  
04:47:31PM 17 occurred --

04:47:32PM 18 THE COURT: There's no evidence from which to  
04:47:35PM 19 conclude that it was error to keep Towanda in the mix.

04:47:41PM 20 MR. DANE: That's correct, Your Honor.

04:47:42PM 21 THE COURT: Nobody testified to that.

04:47:44PM 22 MR. DANE: That's correct, Your Honor. I think --

04:47:46PM 23 THE COURT: Without that evidence, it's just  
04:47:47PM 24 argument, and they can't even make it.

04:47:47PM 25 MR. DANE: That's right, Your Honor.

04:47:52PM 1 THE COURT: They need somebody to have said that, and  
04:47:54PM 2 if somebody didn't say it, then that's it.

04:47:57PM 3 MR. DANE: Right.

04:47:59PM 4 THE COURT: All right, next issue.

04:48:02PM 5 MR. BUTERMAN: Can I just make two points on that?

04:48:04PM 6 THE COURT: I want to be at home tonight.

04:48:14PM 7 MR. BUTERMAN: Your Honor, the only point I was going  
04:48:15PM 8 to make is that I think when we look at this whole thing --

04:48:19PM 9 THE COURT: What evidence do you have that anybody  
04:48:22PM 10 testified to, as opposed to your view or some other lawyer's  
04:48:27PM 11 view, that the inclusion of Towanda in the mix for lost  
04:48:35PM 12 profits, or even antitrust injury for that fact, was wrong?

04:48:42PM 13 MR. BUTERMAN: Mr. Kaplan testified to that today.  
04:48:45PM 14 He didn't quantify it. I want to say that Mr. Dane was  
04:48:48PM 15 correct, Your Honor, and I may have over-spoken.

04:48:51PM 16 I completely agree with what he said regarding the  
04:48:55PM 17 fact that Mr. Tucker did pull out the effects of the merger,  
04:49:00PM 18 and what I was going to was just a much narrower point about  
04:49:04PM 19 the calculations. I think we actually are on the same page  
04:49:07PM 20 about that, but Mr. Kaplan did testify to that issue, and we  
04:49:12PM 21 believe it's not an evidentiary issue. It's just a legal  
04:49:16PM 22 issue. That's why we've raised it.

04:49:19PM 23 The only point I want to make before I move on to the  
04:49:23PM 24 next argument, Your Honor, is at some point, we need to think  
04:49:26PM 25 about what happened here and why, and if this was such a

04:49:29PM 1 massive exercise of market power, really, I mean prices went up  
04:49:35PM 2 1.1 percent, and I understand that Steves' claim is that they  
04:49:39PM 3 should have gone down, but if you have the market power, why  
04:49:42PM 4 aren't you trying to make more money? It just doesn't make  
04:49:46PM 5 sense that this is an antitrust issue. It is just a contract  
04:49:50PM 6 issue on a very, very complicated contract.

04:49:53PM 7 Now, Your Honor, the next argument relates to the  
04:49:59PM 8 issue of lost profits and if lost profits is going to the jury.  
04:50:04PM 9 Our position is that if lost profits is going to the jury, that  
04:50:10PM 10 means that the divestiture claim cannot go to the jury --  
04:50:15PM 11 excuse me, cannot --

04:50:17PM 12 THE COURT: So we don't need to decide that now.

04:50:20PM 13 MR. BUTERMAN: The only reason why I think that we  
04:50:22PM 14 need to deal with this now, Your Honor, this is not an  
04:50:25PM 15 election-of-remedies issue, and Steves has suggested that it  
04:50:28PM 16 is. We believe strongly that it is not. The case law does not  
04:50:32PM 17 support that this is an election of remedies. It's a -- if  
04:50:37PM 18 Steves is taking the position that their future harm can be  
04:50:41PM 19 quantified, which is --

04:50:42PM 20 THE COURT: It's adequacy-of-remedy issue.

04:50:48PM 21 MR. BUTERMAN: That it's capable of being taken care  
04:50:51PM 22 of --

04:50:51PM 23 THE COURT: Is there an adequate remedy at law;  
04:50:54PM 24 that's the issue.

04:50:55PM 25 MR. BUTERMAN: That's correct, Your Honor.

04:50:56PM 1 THE COURT: You raise that when we get to the  
04:50:57PM 2 equitable part of it, and if they win, maybe we won't even get  
04:51:04PM 3 there. But if they win, at least you will know whether there  
04:51:12PM 4 has been a remedy at law that is adequate.

04:51:15PM 5 MR. BUTERMAN: Yes, Your Honor. Our view would be  
04:51:17PM 6 that they lose standing at that point --

04:51:19PM 7 THE COURT: They might. I don't know.

04:51:21PM 8 MR. BUTERMAN: Okay.

04:51:23PM 9 THE COURT: What else?

04:51:25PM 10 MR. BUTERMAN: I think Ms. Maltas is going to take  
04:51:27PM 11 over now, Your Honor.

04:51:30PM 12 THE COURT: I don't think you need to address the  
04:51:32PM 13 in-plant issue. I'm fairly well satisfied that we are not  
04:51:35PM 14 going to have -- they are entitled to judgment -- you are  
04:51:40PM 15 entitled to judgment as a matter of law on that. The real  
04:51:44PM 16 issue for me, and I think the issue as to one and six go to the  
04:51:53PM 17 jury.

04:51:54PM 18 MS. MALTAS: I don't believe we moved --

04:51:58PM 19 THE COURT: No, you didn't. I think the issue is  
04:52:00PM 20 eight. The real issue is what does this contract say about it.

04:52:04PM 21 MS. MALTAS: So, Your Honor, the contract is clearly  
04:52:07PM 22 ambiguous. That's been established as we've continued to sort  
04:52:11PM 23 of grapple with how to even draft the jury instructions, but I  
04:52:16PM 24 think that what we need to do in order to figure out if Steves  
04:52:19PM 25 has established a breach of the contract of Section 8 is to

04:52:23PM 1 drill down into what their actual claims are. And we had an  
04:52:28PM 2 opportunity to file a reply this morning where we tried to do  
04:52:30PM 3 that in a similar way to what we just did with the jury  
04:52:35PM 4 instructions.

04:52:35PM 5 Steves is claiming a breach of contract that Jeld-Wen  
04:52:39PM 6 supplied, in 2015 and 2016, door skins that it claims were  
04:52:46PM 7 defective and that Jeld-Wen failed to reimburse Steves for  
04:52:50PM 8 those specific door skins.

04:52:51PM 9 THE COURT: That's the 441,000 --

04:52:54PM 10 MS. MALTAS: That's the 441,000. There was obviously  
04:52:57PM 11 sort of general testimony by Mr. Gartner and by Mr. Sam Steves  
04:53:02PM 12 about quality issues that they claim to have experienced by  
04:53:06PM 13 Jeld-Wen door skins throughout the years, but no one provided  
04:53:09PM 14 to the jury any evidence that any one of the door skins that  
04:53:15PM 15 make up their actual claim are actually defective, and it fails  
04:53:21PM 16 just as that general matter.

04:53:22PM 17 Whether you think of it as not qualifying for  
04:53:26PM 18 Jeld-Wen's specifications or the warranty or even not being of  
04:53:29PM 19 a quality satisfactory to Steves, there was no actual evidence  
04:53:33PM 20 about any of the door skins that are being claimed here, and so  
04:53:38PM 21 Steves can't prove a breach of contract for those door skins  
04:53:42PM 22 without some evidence.

04:53:43PM 23 More to the point, the only evidence that actually  
04:53:48PM 24 came in about the specific defects actually proves that they --  
04:53:53PM 25 some of them were not defective, and Steves tries to say this



04:53:57PM 1 has something to do with the perfection of their proof, but  
04:54:00PM 2 that's not it. We looked at and introduced two documents  
04:54:04PM 3 reflecting inspection reports by Jeld-Wen where Steves -- the  
04:54:08PM 4 Steves inspector agreed that many of the door skins were usable  
04:54:12PM 5 and they should not have been submitted. Those door skins are  
04:54:16PM 6 part of Steves claim.

04:54:18PM 7 So even thinking about this as being a quality not  
04:54:21PM 8 satisfactory to Steves, they didn't prove that, and they  
04:54:25PM 9 haven't even attempted to prove that as to any door skin. It  
04:54:28PM 10 would have been possible. They have the VDMs, they have the  
04:54:33PM 11 data, they could have grouped it. Mr. Tucker could have  
04:54:35PM 12 testified about it, Mr. Gartner could have testified about it,  
04:54:39PM 13 but just the general vague claims that, at some point, they  
04:54:42PM 14 received defective door skins is not sufficient to prove that  
04:54:46PM 15 this \$441,000 worth of damages is an actual breach of the  
04:54:51PM 16 contract by Jeld-Wen.

04:54:52PM 17 The second major category is the doors, and these  
04:54:56PM 18 doors fail for the exact same reasons. Steves did not attempt  
04:55:00PM 19 to prove that any of the doors that Jeld-Wen has not  
04:55:06PM 20 reimbursed, which is either the REEB claim where Jeld-Wen  
04:55:08PM 21 actually had the opportunity to inspect in some cases, or the  
04:55:14PM 22 doors that have actually never even been submitted to Jeld-Wen,  
04:55:17PM 23 are in any way actually defective.

04:55:20PM 24 And, again, the only testimony that came in to the  
04:55:24PM 25 case about the defects that these doors could suffer indicates

04:55:28PM 1 that many of them most likely are not defective under the  
04:55:32PM 2 contract. And what I did when I cross-examined Mr. Gartner is  
04:55:35PM 3 I walked him through all of the categories of door skin defects  
04:55:41PM 4 that Steves claims in the REEB claim and also that make up the  
04:55:45PM 5 other door claim in Mr. Tucker's report, and he confirmed for  
04:55:50PM 6 many of them that they could be door skin defects caused by the  
04:55:54PM 7 Steves' assembly process or by the installation in the customer  
04:55:58PM 8 location.

04:55:59PM 9 And that's all the jury has. They don't have any  
04:56:01PM 10 information that any door was defective because of a defective  
04:56:06PM 11 door skin. The only evidence they have is that many of the  
04:56:10PM 12 doors that have been claimed might not be Jeld-Wen's fault at  
04:56:13PM 13 all.

04:56:14PM 14 The second issue with the doors is, again, notice and  
04:56:17PM 15 inspection. The REEB claim, Jeld-Wen was not given the  
04:56:22PM 16 opportunity --

04:56:22PM 17 THE COURT: Your point is that as to REEB, they have  
04:56:25PM 18 a bunch of -- a claim of defect asserted by the purchaser,  
04:56:33PM 19 REEB, return of the door skins by REEB to Steves, no proof that  
04:56:44PM 20 anybody at Steves said they -- how many of them were defective,  
04:56:50PM 21 and proof that there's all kinds of problems with the allegedly  
04:56:56PM 22 defective doors including that the claim included doors that  
04:57:22PM 23 weren't even Steves, doors that weren't defective. And under  
04:57:29PM 24 that proof structure, that's not enough to prove defect.

04:57:34PM 25 MS. MALTAS: It's not enough to prove a defect, and

04:57:37PM 1 it's not enough to prove that Jeld-Wen breached the contract by  
04:57:40PM 2 refusing to reimburse for those doors, because Jeld-Wen can't  
04:57:46PM 3 breach the contract just by shipping out defective door skins.

04:57:50PM 4 There's no claim here for damages for the door skins  
04:57:54PM 5 that Jeld-Wen reimbursed, because Steves has been made whole.  
04:57:58PM 6 The breach has to occur by providing defective door skins and  
04:58:02PM 7 then failing to reimburse.

04:58:04PM 8 With the REEB claim, all of the Lebanon doors were  
04:58:08PM 9 destroyed, so Jeld-Wen never had the opportunity to put eyes on  
04:58:12PM 10 even one of them. For the Richmond doors, they only had the  
04:58:16PM 11 opportunity to see fewer than half of those doors, and many of  
04:58:20PM 12 them that they looked at, they rejected. And that is not  
04:58:24PM 13 necessarily a breach to look at a door -- and a crack is a  
04:58:29PM 14 great example.

04:58:29PM 15 THE COURT: Rejection, per se, is not a breach.

04:58:29PM 16 MS. MALTAS: Exactly.

04:58:32PM 17 THE COURT: There has to be a proof that that which  
04:58:34PM 18 was rejected was, in fact, defective, and there's no evidence  
04:58:38PM 19 of that.

04:58:39PM 20 MS. MALTAS: Exactly. And a defect caused by  
04:58:42PM 21 Jeld-Wen, exactly.

04:58:44PM 22 THE COURT: Or the product defines defect as a  
04:58:47PM 23 product that does not meet Jeld-Wen specifications.

04:58:51PM 24 MS. MALTAS: That's right, and it could not be a  
04:58:55PM 25 defect that was caused by Steves.

04:58:56PM 1 THE COURT: If Jeld-Wen ships products that do not  
04:58:58PM 2 meet Jeld-Wen's specifications (hereinafter defective product).

04:59:02PM 3 MS. MALTAS: That's right, Your Honor.

04:59:04PM 4 THE COURT: How do you harmonize that sentence with  
04:59:07PM 5 the preceding sentence in paragraph eight? The product will,  
04:59:15PM 6 at all times, be of quality satisfactory to Steves, meeting  
04:59:18PM 7 Jeld-Wen's specifications, fit for the intended purpose, and  
04:59:21PM 8 subject to Jeld-Wen's standard written warranty applicable to  
04:59:25PM 9 the product (specifications). How do you square those two  
04:59:32PM 10 sentences?

04:59:32PM 11 MS. MALTAS: It's an incredibly difficult task to try  
04:59:36PM 12 to square the sentence that purports to define what a defective  
04:59:40PM 13 product is in this case.

04:59:42PM 14 THE COURT: It's incredibly difficult, but your job  
04:59:45PM 15 and mine is now to do that. How do you do it? I stipulate  
04:59:52PM 16 it's difficult.

04:59:53PM 17 MS. MALTAS: I think that they have to meet that all  
04:59:55PM 18 of those things did not occur, that it was not to Steves'  
05:00:01PM 19 satisfaction, it was not to Jeld-Wen's specifications, it did  
05:00:05PM 20 not meet Jeld-Wen's warranty, and it was not fit for the  
05:00:08PM 21 intended use.

05:00:09PM 22 They haven't attempted to prove, for the actual door  
05:00:14PM 23 skins and doors that they've claimed, any of that, and so  
05:00:17PM 24 that's why for these --

05:00:19PM 25 THE COURT: Wait just a minute. Suppose that the

05:00:25PM 1 product meets Jeld-Wen's specifications, is fit for the  
05:00:31PM 2 limited -- intended purpose and is subject to Jeld-Wen's  
05:00:35PM 3 written warranty but is not of a quality satisfactory to  
05:00:41PM 4 Steves. Doesn't that mean that it doesn't -- the product would  
05:00:45PM 5 not fit the first sentence in paragraph eight?

05:00:49PM 6 MS. MALTAS: It would not fit the first sentence in  
05:00:51PM 7 paragraph eight, but then that can't be squared with the second  
05:00:55PM 8 sentence in paragraph eight. There's no reason why Jeld-Wen  
05:00:58PM 9 would be provided the right of notice, inspection, and  
05:01:03PM 10 verification solely to look at whether or not a door skin meets  
05:01:08PM 11 Steves' quality standards.

05:01:12PM 12 THE COURT: Sure they would as long as Steves had  
05:01:14PM 13 some quality standards. Is there any evidence in the record as  
05:01:18PM 14 to what was quality satisfactory to Steves?

05:01:25PM 15 MS. MALTAS: Steves did not put in any evidence. I  
05:01:29PM 16 introduced with Doug Gartner a document that was created in mid  
05:01:34PM 17 2015 by Mike Wamsley who was the director of quality control.  
05:01:39PM 18 Doug Gartner testified that that was the first comprehensive  
05:01:42PM 19 training of standards for quality issues that Steves had ever  
05:01:47PM 20 had, and that's the document that laid out the fact that for  
05:01:51PM 21 out-of-tolerance door skins, it was going to be Steves' policy  
05:01:54PM 22 to submit entire pallets for reimbursement even though they  
05:02:00PM 23 hadn't tested them and it was possible they were submitting  
05:02:03PM 24 pallets that were not defective.

05:02:05PM 25 So Jeld-Wen's point of view in terms of looking at

05:02:08PM 1 this contract, it absolutely has no right, no requirement to  
05:02:11PM 2 reimburse Steves when Steves is knowingly sending nondefective  
05:02:17PM 3 door skins for reimbursement but calling it part of Steves'  
05:02:21PM 4 quality standards.

05:02:23PM 5 THE COURT: Whose standards were those that -- that  
05:02:27PM 6 was Jeld-Wen's standards, wasn't it?

05:02:29PM 7 MS. MALTAS: Jeld-Wen's technical specifications were  
05:02:32PM 8 provided to Steves in 2014.

05:02:34PM 9 THE COURT: I thought it was 13 for some reason but  
05:02:37PM 10 whatever it was. It had three little sections in the back, on  
05:02:44PM 11 the back of the page of an email or something.

05:02:47PM 12 MS. MALTAS: That's right. And, importantly,  
05:02:49PM 13 Steves --

05:02:49PM 14 THE COURT: My question was not that. My question  
05:02:51PM 15 is, what's the evidence of what is a quality satisfactory to  
05:02:56PM 16 Steves?

05:02:56PM 17 MS. MALTAS: Steves has not put forward any actual  
05:03:00PM 18 evidence of what that is other than whatever we feel at the  
05:03:03PM 19 time, whoever is looking at the door skins.

05:03:05PM 20 THE COURT: Let's deal with the doors. Quite clearly  
05:03:08PM 21 the product -- the product is defined door skins, isn't it?

05:03:12PM 22 MS. MALTAS: Yes.

05:03:23PM 23 THE COURT: Where does it define product?

05:03:26PM 24 MS. MALTAS: I believe it's in paragraph one.

05:03:32PM 25 THE COURT: Shall be the full range of Jeld-Wen

05:03:36PM 1 molded door skin products (the product). So it's door skins.  
05:03:40PM 2 So what's the effect of any additional costs over the price of  
05:03:45PM 3 the defective product, which is door skins, shall be negotiated  
05:03:48PM 4 by the parties on a case-by-case basis? What's the evidence  
05:03:52PM 5 about what that means?

05:03:54PM 6 MS. MALTAS: I don't think that's an ambiguous term,  
05:03:57PM 7 Your Honor. It's a full representation of consequential  
05:04:01PM 8 damages which is permitted under the UCC's explicit terms and  
05:04:05PM 9 Delaware law. We're looking at two highly sophisticated  
05:04:09PM 10 commercial entities that entered into arm's-length negotiations  
05:04:13PM 11 and bargained for a limitation on consequential damages.

05:04:17PM 12 THE COURT: What was in the 2003 agreement on that  
05:04:19PM 13 topic?

05:04:30PM 14 MR. BUTERMAN: Your Honor, I think you stumped a lot  
05:04:33PM 15 of people.

05:04:34PM 16 MS. MALTAS: Their exhibit list is in chronological  
05:04:37PM 17 order, so we should be able to find it fairly quickly.

05:04:41PM 18 THE COURT: Is somebody going to get me the 2003  
05:04:45PM 19 agreement?

05:04:45PM 20 MS. GLAZIER: Yes, sir.

05:04:46PM 21 THE COURT: Are you saying there wasn't any evidence,  
05:04:48PM 22 testimony about what this sentence meant?

05:04:51PM 23 MS. MALTAS: Edward --

05:04:52PM 24 THE COURT: Wholly apart from whether you think it's  
05:04:57PM 25 ambiguous, was there anybody who testified about what that

05:04:57PM 1 sentence meant?

05:04:58PM 2 MS. MALTAS: Edward Steves testified that Jeld-Wen  
05:05:00PM 3 was fully within its rights to refuse to reimburse Steves for  
05:05:04PM 4 doors pursuant to that sentence of Section 8.

05:05:09PM 5 THE COURT: So why doesn't that dispose of the doors  
05:05:13PM 6 claim?

05:05:13PM 7 MS. MALTAS: I believe it does. Steves has raised a  
05:05:15PM 8 latent defects claim which they have presented no evidence that  
05:05:21PM 9 any of the doors they're claiming are actually latent defects.  
05:05:25PM 10 In fact, the evidence proves that many of the doors did not  
05:05:28PM 11 have latent defects, so we don't think it's applicable here.

05:05:33PM 12 THE COURT: What does the 2003 Section 8 equivalent  
05:05:37PM 13 say?

05:05:38PM 14 MR. POWELL: May I show it to Ms. Maltas first, Your  
05:05:41PM 15 Honor?

05:05:41PM 16 THE COURT: That would be good form.

05:05:47PM 17 MS. MALTAS: It's only one sentence, Your Honor. It  
05:05:50PM 18 doesn't speak to doors.

05:05:51PM 19 THE COURT: What does it say?

05:05:52PM 20 MS. MALTAS: It says, "Jeld-Wen will provide and  
05:05:54PM 21 maintain minimum molded door skin product specifications for  
05:05:58PM 22 those products sold to Steves as of the effective date of this  
05:06:01PM 23 agreement."

05:06:01PM 24 THE COURT: That's all it says?

05:06:03PM 25 MS. MALTAS: Is there a reimbursement? That's all it



05:06:06PM 1 says for quality. This is really interesting, Your Honor.

05:06:25PM 2 There is no provision for reimbursement which means that

05:06:29PM 3 prior --

05:06:29PM 4 THE COURT: You mean in the --

05:06:31PM 5 MS. MALTAS: In the 2003. So prior to 2012, the  
05:06:34PM 6 parties were operating on a pure course of dealing, perhaps  
05:06:37PM 7 dictated by the UCC, perhaps just dictated by how they wanted  
05:06:41PM 8 to operate. The change wasn't the CMI acquisition. It was the  
05:06:46PM 9 signing of an agreement in 2012 that gave some actual  
05:06:49PM 10 provisions for how reimbursement would be handled.

05:06:53PM 11 THE COURT: All right, thank you.

05:06:58PM 12 MS. MALTAS: So Your Honor disposed of in-plant  
05:07:00PM 13 damages. There is a final category under breach of contract  
05:07:04PM 14 which is some ancillary damages, most particularly Mr. Tucker's  
05:07:09PM 15 claim that Jeld-Wen's quality problems forced Steves to hire  
05:07:14PM 16 additional personnel. I'm sorry, I've been informed that  
05:07:21PM 17 Steves has withdrawn that. So that's it. Thank you.

05:07:29PM 18 THE COURT: Do you all need a slight respite? Are  
05:07:32PM 19 you all right, or what?

05:07:33PM 20 MS. ECKSTEIN: I'm okay if you're okay.

05:07:35PM 21 THE COURT: Most important person is down here.

05:07:35PM 22 MS. ECKSTEIN: I agree.

05:07:42PM 23 THE COURT REPORTER: I'm okay.

05:07:42PM 24 MS. ECKSTEIN: Your Honor, I'd like to start with the  
05:07:45PM 25 quality satisfactory to Steves. A couple of points about that.

05:07:49PM 1 First of all, there is evidence in the record about what that  
05:07:52PM 2 means. It's the way that the parties had dealt with themselves  
05:07:55PM 3 from the signing, even before the signing of the 2012  
05:07:58PM 4 agreement, but let's start with the signing of the 2012  
05:08:00PM 5 agreement, until Jeld-Wen's policy changed.

05:08:03PM 6 Up until then, Steves, the evidence shows from Mr.  
05:08:07PM 7 Gartner, from Mr. Sam, and I believe Edward Steves as well,  
05:08:11PM 8 that Steves would submit claims for doors, and sometimes  
05:08:15PM 9 Jeld-Wen would inspect, sometimes they wouldn't, but they often  
05:08:20PM 10 paid for the door. And Mr. Gartner testified that they often  
05:08:23PM 11 did so on the basis of goodwill. He tried to say that wasn't a  
05:08:27PM 12 policy, but, frankly, if you're doing it on the basis of  
05:08:30PM 13 goodwill, that seems to be a policy, and he admitted that that  
05:08:34PM 14 policy changed.

05:08:34PM 15 Now, the fact that the contract itself doesn't  
05:08:39PM 16 specify what quality satisfactory to Steves means doesn't mean  
05:08:43PM 17 that that phrase should be written out of the contract.

05:08:47PM 18 THE COURT: But somebody has to testify to what it  
05:08:50PM 19 means. Nobody did. The best that can happen is this is the  
05:08:54PM 20 way the parties did business for the first two years, 18 months  
05:09:02PM 21 to two years of the contract.

05:09:03PM 22 MS. ECKSTEIN: Which, I think, is relevant to what  
05:09:05PM 23 that phrase means, and what the case law says is that when you  
05:09:09PM 24 have a phrase, such as quality to meet a buyer's requirements  
05:09:14PM 25 or satisfaction guaranteed, without an explanation of exactly

05:09:17PM 1 what that means, then you turn to Section 2311, Subsection 1,  
05:09:24PM 2 which states, "An agreement for sale which is otherwise  
05:09:27PM 3 sufficiently definite to be a contract is not made invalid by  
05:09:31PM 4 the fact that it leaves particulars of performance to be  
05:09:34PM 5 specified by one of the parties. Any such specification must  
05:09:38PM 6 be made in good faith and within limits set by commercial  
05:09:43PM 7 reasonableness."

05:09:43PM 8 So, here, I think we can turn to that commercial  
05:09:46PM 9 reasonableness based on the evidence that's in the record, and  
05:09:49PM 10 I would turn Your Honor's attention to the *Simpkins Industry v.*  
05:09:54PM 11 *Standard Group Incorporated* case. It's from the Connecticut  
05:09:59PM 12 Superior Court in 2002 interpreting the UCC -- the cite is 2002  
05:10:06PM 13 WL 1446950.

05:10:10PM 14 There, the contract called for the buyer to purchase  
05:10:14PM 15 recycled paperboard from the seller. The buyer was to use that  
05:10:18PM 16 recycled paperboard to make into cartons for packaging. The  
05:10:23PM 17 contract specified that the recycled paperboard would be of a  
05:10:27PM 18 quality to meet Standard Group's requirements.

05:10:30PM 19 And the Court held that that phrase must be construed  
05:10:33PM 20 in accordance with generally applicable principles governing  
05:10:37PM 21 the construction of contracts, a reasonable person in the  
05:10:41PM 22 buyer's position. And that relates to the duty to act in good  
05:10:44PM 23 faith and to deal fairly, and, therefore, the Court looked at  
05:10:48PM 24 2311 and said that even though the contract did not state what  
05:10:52PM 25 those requirements were, what the buyer's requirements were,

05:10:55PM 1 there was evidence of what was commercially reasonable. And we  
05:10:58PM 2 think that we have that evidence here.

05:10:59PM 3 THE COURT: What was the evidence of what was  
05:11:01PM 4 commercially reasonable?

05:11:05PM 5 MS. ECKSTEIN: I would have to look at the case -- I  
05:11:09PM 6 do have it with me -- to be able to recite that for you  
05:11:11PM 7 specifically.

05:11:14PM 8 THE COURT: Here, why is it commercially reasonable?  
05:11:17PM 9 Why is it commercially reasonable? You are saying that the  
05:11:21PM 10 evidence of how they did things is proof of commercial  
05:11:24PM 11 reasonableness. Why is it -- why is that commercially  
05:11:32PM 12 reasonable evidence of the specification as opposed to the  
05:11:37PM 13 evidence that they were just doing things for goodwill which is  
05:11:41PM 14 what the evidence is?

05:11:44PM 15 Why would anybody pay -- if you're selling somebody a  
05:11:50PM 16 product that costs, what, \$4, and then the door costs \$125,  
05:11:58PM 17 you're going to pay \$125 as some kind of consequential damage  
05:12:05PM 18 without a provision in the contract to do it? Why would that  
05:12:09PM 19 be commercially reasonable? Why isn't that just simply, we're  
05:12:14PM 20 doing this for goodwill, and it makes good sense for us, and we  
05:12:18PM 21 don't want to have goodwill anymore. We don't care. We want  
05:12:21PM 22 the money.

05:12:22PM 23 MS. ECKSTEIN: To answer that question then, I think  
05:12:23PM 24 you need to turn to the rulings in the *Crowell* case and *Viking*  
05:12:28PM 25 *Yacht* case that I identified for you yesterday which would

1 apply here to that phrase the parties are to negotiate for any  
2 additional costs beyond the door skin.

3 And that phrase fails for its essential purposes  
4 under the circumstances as in those cases because of Jeld-Wen's  
5 unilateral position not to negotiate and not to provide any  
6 additional costs beyond the cost of the door skin.

7 In both of those cases, the situation was one which  
8 the original product being sold was not one of high cost. It  
9 was a low-cost product. In the *Viking Yacht* case, it was some  
10 kind of a gel. And the eventual harm in that *Viking Yacht* case  
11 was to the actual ship, the yachts, that this gel was applied  
12 to, and it was in the hundreds of thousands of dollars, and the  
13 Court held that because that phrase, failed for its essential  
14 purpose --

15 THE COURT: What is its essential purpose?

16 MS. ECKSTEIN: The essential purpose there is to  
17 allow for additional remedies.

18 THE COURT: No. The essential purpose, it seems to  
19 me, is to provide for negotiation, and inherent in the concept  
20 of negotiation is there is not necessarily ever going to be an  
21 agreement. You're going to try, or there is going -- there  
22 might be an agreement. But why then -- is there a failure of  
23 the initial -- of the intended purpose of the clause that you  
24 are talking about here, i.e., shall be negotiated on a  
25 case-by-case basis.

05:14:07PM 1 MS. ECKSTEIN: And the problem here we have is that  
05:14:09PM 2 Jeld-Wen simply refused to negotiate. It said, this is our  
05:14:14PM 3 policy now moving forward. We are not paying for any cost of  
05:14:16PM 4 the door, period. There's no -- it essentially reads that  
05:14:20PM 5 clause out of the contract with that decision, unilateral  
05:14:24PM 6 decision on behalf of Jeld-Wen.

05:14:27PM 7 THE COURT: Mr. Steves makes a demand for the door,  
05:14:32PM 8 Mr. Orsino says, let's talk about it. They talk about it.  
05:14:40PM 9 Orsino says, no, I'm not paying for doors, I'm not paying for  
05:14:45PM 10 this door. Let's start with that one. That's not a failure of  
05:14:50PM 11 the essential purpose. That is the purpose achieved, isn't it?

05:14:53PM 12 MS. ECKSTEIN: So long as it's not done in bad faith,  
05:14:57PM 13 yes.

05:14:58PM 14 THE COURT: So now we need to go to a decision that  
05:15:03PM 15 says, okay, you have to pay for the doors because you have paid  
05:15:07PM 16 for them in the past, may have paid for them in the past. Says  
05:15:11PM 17 Mr. Hachigian, not paying for them anymore, period. Why isn't  
05:15:15PM 18 that a case-by-case basis; that is, now the case by case is the  
05:15:22PM 19 doors are on the table, they have had a negotiation, the  
05:15:25PM 20 negotiation has failed. Why is that a failure of the purpose  
05:15:31PM 21 of the negotiation clause?

05:15:32PM 22 MS. ECKSTEIN: Because it's not on a case-by-case  
05:15:35PM 23 basis. Instead, it's a unilateral decision not to sit down and  
05:15:39PM 24 negotiate on a case-by-case basis. It's a unilateral decision  
05:15:42PM 25 to say we are not negotiating.

05:15:45PM 1 THE COURT: Have you alleged in your complaint that  
05:15:48PM 2 the breach of the contract was a bad-faith refusal to negotiate  
05:15:53PM 3 under -- any additional costs over the price of the defective  
05:15:57PM 4 product shall be negotiated by the parties on a case-by-case  
05:16:01PM 5 basis? I don't think that's in the complaint -- in the answer,  
05:16:04PM 6 is it? I mean the complaint, excuse me.

05:16:08PM 7 MS. ECKSTEIN: Pull a copy of the complaint.

05:16:18PM 8 THE COURT: She can get her hands on anything.

05:16:24PM 9 MS. ECKSTEIN: We are lucky to have her.

05:16:26PM 10 THE COURT: Listen, while you are getting your hands  
05:16:29PM 11 on it, do you have an extra copy for me?

05:16:31PM 12 MS. GLAZIER: Yes, sir, of course.

05:16:38PM 13 THE COURT: I'll give it back to you so you won't  
05:16:42PM 14 have to make more copies. Where is that allegation?

05:18:14PM 15 MS. ECKSTEIN: Your Honor, starting at paragraph 128,  
05:18:20PM 16 we address there the credits that have been issued to Steves'  
05:18:23PM 17 customers after selling doors incorporating defective door  
05:18:28PM 18 skins with latent defects. And we state that in such instance,  
05:18:34PM 19 it has been commercially reasonable for Steves to issue credits  
05:18:37PM 20 to its customers, and that's Jeld-Wen, in 132, has refused full  
05:18:47PM 21 reimbursement for any such credits.

05:18:55PM 22 THE COURT: The closest I see is in paragraph 172,  
05:19:04PM 23 and it refers to Jeld-Wen's unilateral decision to no longer  
05:19:10PM 24 sell certain door skins.

05:19:12PM 25 MS. ECKSTEIN: To no longer offer -- I'm sorry, yes,

05:19:15PM 1 Your Honor.

05:19:18PM 2 THE COURT: That's door skin. That's not doors. I  
05:19:23PM 3 don't see anything in here about being a violation of the  
05:19:28PM 4 negotiation provision of paragraph -- Section 8 of the  
05:19:32PM 5 contract. I have -- I don't think -- I read 128, I think it  
05:19:40PM 6 is, or 22?

05:19:43PM 7 MS. ECKSTEIN: And 132.

05:19:47PM 8 THE COURT: I don't think that does it.

05:19:48PM 9 MS. ECKSTEIN: So I think, Your Honor, this goes to  
05:19:50PM 10 whether Steves can be entitled to consequential damages. I'm  
05:19:54PM 11 not sure it was something that was required to be alleged in  
05:19:57PM 12 the complaint, but it goes to whether --

05:19:59PM 13 THE COURT: It's a breach. It's a breach of the  
05:20:02PM 14 contract. You are alleging -- in fact, the instructions say it  
05:20:05PM 15 is a breach of the contract to not give the doors, not pay for  
05:20:13PM 16 the doors. You are alleging it as a breach, aren't you?

05:20:18PM 17 MS. ECKSTEIN: Yes, we are. The question, though, it  
05:20:24PM 18 seems to me, is whether this is a limitation of remedy that  
05:20:26PM 19 fails for its essential purpose.

05:20:28PM 20 THE COURT: "This" meaning that paragraph?

05:20:30PM 21 MS. ECKSTEIN: That sentence.

05:20:32PM 22 THE COURT: But I don't think it fails of its  
05:20:36PM 23 essential purpose. I don't think there's any evidence it fails  
05:20:39PM 24 of its essential purpose. What's the other language in the UCC  
05:20:42PM 25 after fails of its essential purpose?



05:20:44PM 1 MS. ECKSTEIN: That one goes to unconscionability,  
05:20:44PM 2 and we have not --

05:20:44PM 3 THE COURT: It's not unconscionable.

05:20:44PM 4 MS. ECKSTEIN: No. We have not asserted that. I  
05:20:48PM 5 think that only goes to consumer goods as you mentioned  
05:20:52PM 6 yesterday.

05:20:56PM 7 THE COURT: All right, anything else?

05:20:57PM 8 MS. ECKSTEIN: Just one other point regarding the  
05:21:01PM 9 issue on the specifications, and the way that we read this  
05:21:07PM 10 paragraph is there's a reference to specifications, little S,  
05:21:11PM 11 and then specifications, capital S. The little S would refer  
05:21:16PM 12 to Jeld-Wen's specifications. The capital S refers to the four  
05:21:20PM 13 elements that are required under that first sentence of  
05:21:23PM 14 paragraph eight. And with respect --

05:21:26PM 15 THE COURT: That doesn't refer to it. It is  
05:21:28PM 16 contained in it.

05:21:29PM 17 MS. ECKSTEIN: The specifications little S is  
05:21:32PM 18 contained with specifications capital S.

05:21:37PM 19 THE COURT: In the first sentence, the words meeting  
05:21:43PM 20 Jeld-Wen's specifications, the S is lower case.

05:21:46PM 21 MS. ECKSTEIN: Correct.

05:21:47PM 22 THE COURT: In the parenthetical after subject to  
05:21:52PM 23 Jeld-Wen's standard written warranty applicable to the product  
05:21:56PM 24 appears the word (the specifications), and it's capitalized,  
05:22:01PM 25 and then the word -- Jeld-Wen's specifications appears in the

05:22:08PM 1 next sentence where there's a definition of defective product.  
05:22:12PM 2 If Jeld-Wen ships product that do not meet Jeld-Wen's  
05:22:16PM 3 specification (herein after defective product) then Jeld-Wen,  
05:22:19PM 4 after notice of inspection and verification of the defective  
05:22:23PM 5 product, will be obliged to reimburse Steves for the price of  
05:22:27PM 6 the defective product. What's the significance of your talking  
05:22:33PM 7 about the capitalization of S?

05:22:36PM 8 MS. ECKSTEIN: The only point there was to make the  
05:22:38PM 9 distinction between the non-capitalized S and the capitalized  
05:22:42PM 10 S, because I think the capitalized S encompasses the four  
05:22:46PM 11 elements, but separately, with respect to the lower case S, the  
05:22:49PM 12 evidence is that Jeld-Wen provided to Steves technical  
05:22:56PM 13 specifications in 2014.

05:22:58PM 14 I believe if you look at that exhibit, it refers to  
05:23:00PM 15 those technical specifications as a draft, but, separately, the  
05:23:04PM 16 majority of our defect claims do not go to technical issues but  
05:23:08PM 17 to aesthetic specifications, and the evidence is that Jeld-Wen  
05:23:12PM 18 never provided aesthetic specifications to Steves, and it seems  
05:23:19PM 19 certainly unfair to require Steves to prove that Jeld-Wen's  
05:23:26PM 20 door skins did not meet specifications that have never been  
05:23:29PM 21 provided to Steves in the first place. Thank you.

05:23:41PM 22 MS. MALTAS: I just had one final point as to the  
05:23:46PM 23 definition of what's defective product. Ms. Eckstein pointed  
05:23:51PM 24 out that if there is ambiguity in the definition of, for  
05:23:54PM 25 example, quality that is sufficient for Steves, that you can

05:23:59PM 1 look to the UCC and you can look at what's commercially  
05:24:02PM 2 reasonable in order to define the defect, but even if that were  
05:24:06PM 3 to be the standard that the Court applied, Steves did not  
05:24:09PM 4 present any evidence that would allow the jury to conclude that  
05:24:14PM 5 any door skins or doors are defective in terms of some  
05:24:18PM 6 commercially reasonable standard.

05:24:21PM 7 THE COURT: They say it's commercially reasonable  
05:24:23PM 8 because of the way they've done business, the conduct for the  
05:24:27PM 9 past -- first two years of the contract.

05:24:31PM 10 MS. MALTAS: First of all, there's no actual evidence  
05:24:33PM 11 that was put in other than just sort of general testimony that  
05:24:37PM 12 that's how it was done. Second of all, what their allegation  
05:24:42PM 13 is is that Jeld-Wen just paid all claims sight unseen, and I've  
05:24:47PM 14 not seen any case law showing that is a requirement to be  
05:24:51PM 15 commercially reasonable, that a supplier has to pay every  
05:24:54PM 16 single defective claim presented to it without looking at it  
05:24:58PM 17 and confirming that it's really defective and it's really the  
05:25:02PM 18 supplier's fault.

05:25:03PM 19 Moreover, Steves doesn't do that. We had testimony  
05:25:06PM 20 from Mr. Gartner that when Steves receives defect claims from  
05:25:09PM 21 its customers, it inspects them, and it only pays the claims  
05:25:13PM 22 that are actually defective. So it's not reasonable to say  
05:25:17PM 23 that Jeld-Wen has got to pay Steves for every claim.

05:25:21PM 24 THE COURT: If there's evidence that they paid the  
05:25:23PM 25 claims that were actually defective, isn't that proof as to the

05:25:27PM 1 REEB claims and all of the other claims that came back to them  
05:25:30PM 2 that they had concluded they were defective?

05:25:34PM 3 MS. MALTAS: Yes. Jeld-Wen has paid, and --

05:25:37PM 4 THE COURT: No, I mean that the claims that came  
05:25:41PM 5 back to -- isn't that evidence, not dispositive proof but isn't  
05:25:45PM 6 it evidence that Steves says they inspect and only pay that  
05:25:51PM 7 which is defective, they paid their costs for the door to their  
05:25:56PM 8 customers? Isn't that evidence that the -- that Steves found  
05:26:02PM 9 them to be defective and that that's proof that there's a  
05:26:05PM 10 defect?

05:26:06PM 11 MS. MALTAS: It's proof there's a defect in the door,  
05:26:08PM 12 but that's not proof that it's a defect in the door skin or  
05:26:12PM 13 that it's a defect in the door skin caused by Jeld-Wen,  
05:26:18PM 14 because there's a --

05:26:19PM 15 THE COURT: Stop there just a minute. Is there any  
05:26:21PM 16 evidence in this whole case that there's some defect in the  
05:26:25PM 17 doors other than with the door skin?

05:26:30PM 18 MS. MALTAS: Oh, sure. You can have defects from the  
05:26:32PM 19 assembly of the door. So an example would be a crack. So you  
05:26:35PM 20 could get a door skin that has a crack in it, or you could  
05:26:38PM 21 crack the door skin when you're pressing the door. There can  
05:26:41PM 22 also be a lot of different causes of delamination.

05:26:45PM 23 So there's a lot of discussion in this case about  
05:26:47PM 24 cleavage which is a technical specification for a door skin.  
05:26:51PM 25 If your cleavage is off, then you can have delamination of the

05:26:54PM 1 door, but door assembly issues like not having enough glue or  
05:26:59PM 2 glue wipe-off can also cause delamination. So there's a lot of  
05:27:03PM 3 things that can cause a door defect. Thank you.

05:27:08PM 4 THE COURT: Anything else?

05:27:10PM 5 MR. MACH: I have just one very minor point of  
05:27:13PM 6 clarification if it would be helpful to Your Honor.

05:27:15PM 7 THE COURT: All right.

05:27:17PM 8 MR. MACH: The point, Your Honor, is that insofar as  
05:27:22PM 9 the Court is inclined to dismiss certain contract claims for  
05:27:27PM 10 failure to prove a breach of contract, I just want to make sure  
05:27:30PM 11 it's clear that our view is that the elimination of such a  
05:27:33PM 12 contract claim would typically not result in a corresponding  
05:27:37PM 13 decrease in the antitrust claims relating to the same  
05:27:40PM 14 underlying conduct. You are looking at me like I should  
05:27:46PM 15 elaborate, so I will do so.

05:27:49PM 16 THE COURT: That was a very charitable  
05:27:55PM 17 interpretation.

05:27:58PM 18 MR. MACH: I hesitate to put words in your mouth, but  
05:28:02PM 19 I feel that one worked out all right.

05:28:03PM 20 THE COURT: You seized the moment.

05:28:05PM 21 MR. MACH: So if you look at something like quality  
05:28:07PM 22 or returns, for example, there is a question of whether the  
05:28:13PM 23 defects or the change in the return practices represents a  
05:28:16PM 24 breach of contract. If it doesn't represent a breach of  
05:28:20PM 25 contract, that doesn't have any bearing on whether a decrease

1 in quality or a change from a more generous to a less generous  
2 return policy, which is a form of service, is or is not an  
3 anticompetitive effect of the merger.

4 THE COURT: We will take a 15-minute recess, and I'll  
5 be back.

6 MS. ECKSTEIN: Your Honor, would you like a copy of  
7 the *Simpkins* case that I mentioned?

8 THE COURT: Yes, please.

9 MS. MALTAS: Your Honor, I'm sorry, before we break,  
10 I have been deputized by the trade secrets team to ask if Your  
11 Honor has a ruling on their motion for a ten-page extension for  
12 the summary judgment opposition that's due tomorrow.

13 THE COURT: Were you deputized to address it  
14 substantively and why you need it?

15 MS. MALTAS: Yes, I am.

16 THE COURT: Come here and tell.

17 MS. MALTAS: So, Your Honor, Steves has made a  
18 broad-reaching motion against the trade secrets of which I know  
19 that there are a number that has been asserted by Jeld-Wen.  
20 Steves was able to make its arguments in more of a broad way  
21 that attacks a number of different trade secrets at once.

22 In order to adequately respond to the precise trade  
23 secrets, Jeld-Wen is just asking for ten additional pages so it  
24 can address each trade secret. I know that Ms. Eckstein had  
25 raised yesterday the possibility that Jeld-Wen is going to be

05:29:55PM 1 adding trade secrets in its opposition.

05:29:57PM 2 THE COURT: They wouldn't dare.

05:30:00PM 3 MS. MALTAS: They wouldn't dare, will not be adding  
05:30:03PM 4 any trade secrets. I understand one may be removed. So it's  
05:30:07PM 5 really just to provide sufficient space for Jeld-Wen to address  
05:30:12PM 6 Steves' arguments.

05:30:13PM 7 THE COURT: How many trade secrets are there now?

05:30:17PM 8 MS. ECKSTEIN: It depends on how you count them, Your  
05:30:20PM 9 Honor, which is one of our problems. We don't know.

05:30:23PM 10 THE COURT: Just sort of like listening to testimony  
05:30:27PM 11 about what is the meaning of is. On the high end, it is X, on  
05:30:35PM 12 the low end it is Y.

05:30:37PM 13 MS. ECKSTEIN: Low end, I think it's 28, 29. On the  
05:30:40PM 14 high end, it's probably in the seventies.

05:30:43PM 15 THE COURT: Okay. At least it's not 400. All right,  
05:30:47PM 16 let me hear from Ms. Eckstein.

05:30:49PM 17 MS. MALTAS: Can I say that we would also be happy to  
05:30:51PM 18 have Steves have an extension on its reply in order to  
05:30:53PM 19 adequately address the arguments we'll make in the opposition.

05:30:57PM 20 THE COURT: Anything they want?

05:31:00PM 21 MR. BUTERMAN: Yes, Your Honor, please.

05:31:02PM 22 MS. ECKSTEIN: I'm going to hold them to that if you  
05:31:04PM 23 let them do this. The reason --

05:31:07PM 24 THE COURT: What do you need to reply?

05:31:09PM 25 MS. ECKSTEIN: I don't know. Until I see their

05:31:12PM 1 papers, I don't know what I need to reply. The reason we  
05:31:14PM 2 opposed -- and we don't typically oppose requests for  
05:31:18PM 3 extension. The reason we opposed it is because we've had this  
05:31:20PM 4 problem all along in this case, what are the trade secrets, and  
05:31:23PM 5 we still have that problem.

05:31:25PM 6 So our position is if they can't tell us what the  
05:31:28PM 7 trade secrets are in a 30-page brief -- we filed a 30-page  
05:31:32PM 8 brief. They should be able to do the same as well.

05:31:35PM 9 THE COURT: Why don't we give them 40 pages and give  
05:31:37PM 10 you 40 pages, and one of the things you can do is if they dodge  
05:31:40PM 11 the trade secrets in there, you can move to strike them or  
05:31:44PM 12 something. Does that give you enough -- he said anything. Do  
05:31:47PM 13 you want more?

05:31:48PM 14 MS. ECKSTEIN: I'll take 40 then.

05:31:51PM 15 THE COURT: Yes, it will be granted. Just tell them  
05:31:53PM 16 yes, to proceed accordingly.

05:31:56PM 17 MS. MALTAS: Thank you, Your Honor.

05:31:56PM 18 THE COURT: 15 minutes, please.

05:31:58PM 19 MR. BUTERMAN: Yes, Your Honor.

05:31:59PM 20  
05:31:59PM 21 (Recess taken.)

05:52:34PM 22  
05:52:34PM 23 THE COURT: All right, on the motion -- motion for  
05:52:41PM 24 judgment as a matter of law made by Jeld-Wen, the motion will  
05:52:51PM 25 be denied as to the antitrust issues. It will be held in



05:52:57PM 1 abeyance with respect to Section 8 issues. All of this is  
05:53:06PM 2 coming here under theories that I don't see in the papers, in  
05:53:12PM 3 the pleadings, and under legal theories that haven't been  
05:53:16PM 4 adequately briefed.

05:53:18PM 5 I think that probably, for your own purposes, there  
05:53:21PM 6 won't be any -- that judgment as a matter of law ultimately  
05:53:28PM 7 will be granted on behalf -- as to the doors claim. I think  
05:53:31PM 8 there is enough evidence for the door skins to go to the jury,  
05:53:36PM 9 so that will be denied.

05:53:39PM 10 The motion as to the in-plant damages will be granted  
05:53:45PM 11 because there isn't any way, under the law or the facts, that  
05:53:50PM 12 that claim could be decided affirmatively for the plaintiff on  
05:53:56PM 13 the record as it currently exists.

05:53:59PM 14 So you'll -- you might as well also tell your people  
05:54:04PM 15 who are preparing their arguments that I am inclined -- that  
05:54:10PM 16 the efficiencies issue will not be part of the case, but I need  
05:54:15PM 17 to have that -- your reply on it and the cases. I need to know  
05:54:22PM 18 the cases you are relying on to match up with what they've  
05:54:27PM 19 filed, and I'll hear you in the morning between quarter of 9:00  
05:54:31PM 20 and 9:00. There's a copy of the complaint back that Magic  
05:54:42PM 21 produced back there.

05:54:49PM 22 I think that's all that needs to be done tonight.  
05:54:53PM 23 You have the instructions. And the instructions do not contain  
05:55:02PM 24 anything about the in-plant damages. We took that out right  
05:55:06PM 25 then already. Is there anything else you all need to take up?

Date \_\_\_\_\_